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"Privilege" and "Immunity" as Used in the Property Restatement

ALBERT KOCOUREK*

I

No modern code of law can avoid the stating of definitions, or at least the stating of rules definitional in their nature. Thus, the German Civil Code states: "The legal capacity of a human being begins with the completion of birth."² Again, the same code states: "Majority begins with the completion of the twenty-first year of age."³ But even definitions such as these are not numerous in the German Civil Code. The Property Restatement, regarded as a code, goes far beyond what any other code of law, ancient or modern, has ever attempted in the matter of legal definitions, illustrations, and explanations of the principal text.⁴ It is not the purpose of this discussion to consider these features of the Restatement.

As a code, the Property Restatement is unique in setting out definitions of certain terms regarded as fundamental for any branch of the law whatsoever. In a word, it is the first code of law to contain a schedule of juristic terms.⁵ The Property Restatement in another feature is strikingly unique in that these juristic terms are employed in stating the content and range of legal rules.

While this use of a thorough-going terminology is an historical novelty in codification, yet the juristic ideas will be quickly recognized as an adoption in purest form of the "fundamental legal conceptions as applied in judicial reasoning" expounded by the late Professor Hohfeld.⁶ The Hohfeld system, soon after its

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1. Restatement of the Law of Property, as Adopted and Promulgated by the American Law Institute at Washington, D. C., May 9, 1936. The present examination is limited to the terms "Privilege" and "Immunity." See chap. 1. Definition of Certain General Terms, vol. 1, pp. 3-35.

2. Art. 1, German Civil Code (Translation by Chung Hui Wang, 1907).

3. Art. 2, German Civil Code.

4. The principal text in all the Restatements is printed in black-letter type.

5. In lesser degree, other Restatements also employ definitions and fundamental terms. There is some inconsistency among the Restatements as to these matters.

6. First published as Hohfeld, *Some Fundamental Legal Conceptions* as

exposition by its author but lamentably after his untimely death, became the subject of considerable debate.⁷ The debate had the demerit of presenting the issues involved in abstract form and it is fortunate that the Hohfeld system can now be appraised in such a concrete and important application as the Property Restatement.

Before attempting to consider the terminology used in the Restatement, it will be desirable to state some of the elementary ideas which bear on the discussion to follow.

First of all, any rule involves some form of constraint; thus, violation of any rule of morals, custom, fashion or deportment will produce unfavorable reactions. This is true of all rules. It is strikingly true in the case of legal rules where the reaction, uniquely, in the last resort, either directly or indirectly, is that of state controlled physical force. We need not here go into the details of the nature of rules. It will, we believe, suffice simply to recall this obvious idea.⁸ It should equally be obvious that where, as to given conduct, there is no rule to govern it, there is no constraint. Such conduct for the area of law is called Liberty or Freedom. For the area of law, Freedom has no *legal* significance.⁹

Another elementary fact is that legal relations are relations which bring two legal persons into a *nexus* which involves a constraint of one of them in favor of the other. Thus, if X and Y are two legal persons, there are only two ways in which one of these persons can exert a constraint on the other. Either Y *must*¹⁰ act for X, or X *can* act against Y. There are, therefore, two constraint possibilities, and only two. There can not in any way be a third form of constraint operating in law as between X and Y.¹¹

applied in *Judicial Reasoning* (1913) 23 Yale L. J. 16, and (1917) 26 id. 710; reprinted in pamphlet form under the same title (Yale University Press, 1919) and with other essays (Yale University Press, 1923).

7. The first article seems to be that of Cook, *Hohfeld's Contribution to the Science of Law* (1919) 28 Yale L. J. 721; the latest that of Radin, *A Restatement of Hohfeld* (1938) 51 Harv. L. Rev. 1141.

8. It may not be amiss to state that the laws of nature (so-called) are not rules except in a metaphorical sense.

9. For jurisprudence, one of the most dismal facts to be noted is that many otherwise competent writers seem to be unable to distinguish between the *content* of Freedom and the external protection of that content.

10. The term "must" is to be understood in the sense of what the law requires.

11. This logical fact may be demonstrated mechanically. As between X and Y, motion can be projected in only two directions: either to or from X, or to or from Y, respectively, as against the other.

From the standpoint of logic, it is immaterial what symbols are used to denote the legal quality of X and Y, respectively, in these two constraint situations. The following word symbols have gained some currency. Where the legal relation is of the *must* kind, the relation may be called a Claim-Duty relation. Where the legal relation is of the *can* type, the relation may be called a Power-Liability relation.¹² When Hohfeld constructed his tables of jural relations, the above two types, Claim-Duty and Power-Liability, had already been recognized by jurists in America and in Europe.¹³

Before we state the formulation of terms proposed by Hohfeld, it will be helpful if we consider a similar problem in the classification of one of the material sciences. An observer of the phenomena of life, long ago classified living beings into Plants and Animals. At that time the difficulty for classification of micro-organisms had not yet been presented. This ancient and simple classification has survived and it is the subject-matter of biology. But suppose in one of the many periods of material and intellectual unrest and upheaval which have supervened, an expert in biology, in order to make his science more useful, had invented two new species to be called, respectively, No Plants and No Animals. And, then in another period of unrest and upheaval, let us suppose another scientist, observing how frequently the botanist encounters No Plants, and how frequently the zoölogist encounters No Animals, had proposed that for the new species, No Plants, we use the term *Gostoks* and for the other new species, No Animals, we use the term *Wousins*. We should now have, as is evident, four species: Plants, *Gostoks*, Animals, *Wousins*.¹⁴

It would hardly have been supposed that anything of this sort could have entered into the construction of the eight correlatives proposed by Hohfeld. Let us see. We started with Claim-Duty and Power-Liability. Now if we place the word "no" be-

12. Of these four terms only two may be said to be thoroughly accepted—Duty and Power. The term Claim is often used as a procedural claim or demand. The term Liability is often used in the sense of Duty. We shall for convenience in what follows continue to use the terms as above set out.

13. But not in these terms. See, for example, Windscheid, *Lehrbuch des Pandektenrechts* (9th ed. 1906) I, § 37. In general, the correlative terms were neglected and there was a tendency to include the idea of Freedom under that of Power.

14. If the botanist and the zoölogist met they might together find a crystal. The botanist would insist that while the crystal shows a form of life, it is in fact a *Gostok*. The zoölogist would, of course, insist that the crystal in any event is a *Wousin*.

fore each of these four terms, we get the original Hohfeld table of correlatives which will read as follows:¹⁵

	(1)	(2)	(3)	(4)
I.	Claim	No Claim	Power	No Power
	Duty	No Duty	Liability	No Liability

We now get the *Gostoks* and *Wousins* in this table:¹⁶

	(1)	(2)	(3)	(4)
II.	Claim	No Claim	Power	Disability
	Duty	Privilege	Liability	Immunity

It thus clearly appears that four of the eight terms employed in the above tables are purely negative. Their only function is operational; that is to say, to exclude any given relation from the table of jural relations. The fact that No Duty is replaced by the term Privilege does not add anything of further meaning. It will be noticed in the first table above, that No Claim and No Duty are put down as correlatives. It is true that where there is No Claim there can be no duty in the same reference. The logical problem here is how a nothing can be in relation to anything (either a something or another nothing). Or, to put it differently, if A does not have a duty to B, how as to that, can it be said that A and B are in legal (constraint) relation when there is no constraint?¹⁷

Attention may now be called to another point. It has been stated and confirmed by the Restatement that if A has a claim against B to an act, B has a duty to A to do that act, and B also has a *privilege* to do that act. If now we translate the *Gostoks* into their original meaning we get this situation:

- (1) A has a claim against B; B has a duty to A.
- (2) A has no claim against B; B has no duty to A.

In other words, A has a claim and A does not have a claim referring to a given act, and B has a duty and B does not have a duty as to the same act. This is a logical contradiction which

15. In the tables which follow, the term used for *Claim* by Hohfeld and adopted by the Restatement, is *Right*.

16. We may encounter a more serious difficulty even than that shown above (note 14 supra): A may sue B on a claim of debt of \$1,000, but B may have a set-off against A of \$5,000. For the purposes of legal analysis we are not aided by saying that B has a "privilege" not to pay A.

17. Some writers have taken the astonishing position that where B sues A, and the court pronounces a judgment of No Duty in A's favor, we have therefore the most solemn proof of the existence of a legal relation between A and B so far as concerns the No Claim and No Duty.

necessarily must follow if the term Privilege is translated by No Duty.¹⁸

We come now to the remaining negative category, No Power, whose correlative is No Liability. Here again the empty character of this supposed category is concealed by the term Disability whose correlative is Immunity. Immunity in general speech is always an immunity from *something*. Outside of poetry and mythology, there can be no immunity from attack by a unicorn or a centaur. In legal parlance, there are "immunities" from levies on exempt chattels, "immunities" from arrest of witnesses, judges and legislators, "immunities" from taxation, and so forth, but it is to be noted that in all cases a legal "immunity" can be violated.¹⁹ Perfect legal immunities do not exist. It is the nature of legal rules that they may be violated. Use of the term Immunity as correlative to No Power is simply an operational idea. It does not represent any substantive element in a classification of legal constraints.

We have indicated that Duty relations and Power relations are the only two possible legal (constraint) relations. In the whole range of legal rules for any time or place any *legal* relation which may by any possibility be encountered, necessarily

18. To overcome this logical difficulty, some writers supporting the Hohfeld system suggested that Privilege should not be translated as No Duty but as No Duty Not to. Applied to the example above, it appears that if *A* has a claim to an act against *B*, *B* has a duty to do the act and *B* has No Duty Not to do the same act. This use of the word Privilege results in one of the most trivial of tautologies. If *B* has a duty, can it be supposed that anything of significance has been stated if we say that *B* having that duty "does not have a duty not to perform it?"

It clearly appears, we think, that, so far as concerns Duty, the term Privilege is a highly inconvenient and oblique synonym. It would seem, also, that if there is No Duty that is the best way to express it. There is no need to invent a Gostok to say No Duty.

It may also be observed that if Privilege is a synonym for Duty, then the table of terms in actuality reduces to six jural terms instead of eight. For example, in classifying eye specialists we would not say that they consist of optometrists, oculists, ophthalmologists, and eye doctors.

But this is not yet all. The emendators of Privilege reformed this term by the definition No Duty Not to, but they failed to reform the other end of the correlation which was No Claim. We submit that if *No Duty Not to* is correct the correlative should be *No Claim Not to*.

19. It will occur to the reader to ask whether the imperfect immunities which the law recognizes are legal relations. The short answer is that the imperfect immunities recognized by the law are species of the Duty relation. There can be no Immunity in *X* unless *Y* has a duty respecting the content of the Immunity. Thus, if *X*, a judgment debtor, has filed a schedule of exemptions, *Y*, the holder of an execution, owes a duty to *X* not to levy on *Y*'s exempt chattels. There is one and only one relation here which may be expressed in the verbal form of Claim-Duty or of Immunity-Disability. The variant form, Immunity-Disability, has the linguistic function of emphasizing an exemption from the general rule. Strangely enough, in the Hohfeld sys-

must be one of these forms (Duty or Power).²⁰ We repeat, there can be no other form of legal (constraint) relation. Immunity as correlative to No Power is no more a legal relation for purposes of law than is a *Wousin* a species of life for the purposes of biology.

Classification of legal relations into Duty relations and Power relations, rests on a single *fundamentum divisionis*—legal constraint. In the Hohfeld table of correlations consisting of four principal terms (*relata*) and four other terms necessarily implied (*correlata*), there will be found two distinct *fundamenta divisionis* as follows: (1) legal constraint; (2) negation of legal constraint. This statement, however, is true only on the view that Privilege is the exact equivalent of No Duty.²¹ Hohfeld never made clear what he meant by Privilege. When he used No Right (No Claim) as the correlative of Privilege he seemed to choose No Duty as the meaning of Privilege. The group which supported the Hohfeld system, seeing the logical difficulty or inconvenience of having Duty and No Duty coincide in application as to the same act, invented the new meaning of No Duty Not to, for the dominant side of the Privilege correlation. As we have already pointed out they did not reform the other side of the correlation. The result was the inelegant and logically incoherent combination of No Duty Not to, as the correlative of No Right (No Claim). Upon this solution the person entitled to have an act done would have the Right and the No Right as to the same act.

Hohfeld thought also that the meaning of Privilege could be expressed by the term Freedom.²² If he had put down the word Freedom²³ in his Table he would have encountered the difficulty of finding a correlative for it.²⁴ In a logical sense, the term Free-

tem, imperfect immunities do not appear to find a place. In the Restatement (Vol. I, p. 8) it is said: "A trespass on A's land by B, would change A's legal relations. To that extent A would not have an immunity." The perfect Immunity of the Hohfeld system reduces to the simple equation: $O=O$. It has absolutely no content.

20. Professor Thompson G. Marsh in his doctoral thesis entitled *Jural Pasigraphy* (Yale Law School 1935) has made a symbolic analysis of various cases in different fields of law, by use of signs expressing the Duty and the Power relation. In such a detailed analysis as that made by Professor Marsh the unreality of negative content categories is strikingly apparent. They do not and can not enter into analysis simply because there is nothing to be affirmed of such categories.

21. As to the Hohfeld "Immunity" there is no doubt; it is used as the exact equivalent of No Liability.

22. "The closest synonym of legal 'privilege' seems to be legal 'liberty' or legal 'freedom'": Hohfeld, *Fundamental Legal Conceptions* (1923) 47.

23. The Property Restatement (§ 2) has defined Privilege as a "legal freedom."

24. The point involved is that of the logical distinction of "absolute" and "relative" terms.

dom can not have a correlative. If it is true that Freedom is a synonym for Privilege, then we shall have a third *fundamentum divisionis* based on Freedom, with the inconvenience that Freedom is an idea wanting in correlation.²⁵

It is an astonishing fact that although the Hohfeld system was published some twenty-five years ago, neither Hohfeld nor any of his followers has yet succeeded in giving a satisfactory definition of the term Privilege. It has been variously defined as No Duty, No Duty Not to, and Freedom.²⁶ For the moment, choice of the idea of "legal freedom" represents the view of a formidable group of legal experts, representing the American Law Institute.

II

We now proceed to examine the definitions adopted by the Property Restatement.

§ 1. "A right . . . is a legally enforceable claim of one person against another, that the other shall do a given act or shall not do a given act."

Our comment. Right and claim would seem to be equivalent. Two words are used where one should suffice. Appropriate terms for this relation are hard to find, and as to Right and Claim, neither can be sacrificed.²⁷

25. Although probably contrary to program, it is possible to consider the Hohfeld formulation of terms not as one system but as three systems based on three separable principles of (i) legal constraint, (ii) absence of legal constraint, and (iii) absence of rules (Freedom). In the view which we believe is the correct one, only the first of these principles could validly be admitted as significant for legal relations. In the other view, which includes the remaining two principles of division, the system would still need reformation to include the supposed negative correlation of No Claim-No Duty. The system would then have five principal terms and four correlative terms as follows:

(1)	(2)	(3)	(4)	(5)
Claim	No Claim	Freedom	Power	No Power
Duty	No Duty		Liability	No Liability

26. There are various closely connected but yet separable ideas involved in this problem, as follows: Freedom, No Duty, No Duty Not to, Liberty (subjective sense), Freedom (objective sense), Right, Exemption, Privilege (common law sense), Duty, Power (common law sense), etc. No Duty as a general negative obviously has a wider range than Freedom. If No Duty is limited by the universe of discourse to human behavior, it still has a wider range than Freedom; but if No Duty should be limited to legally significant acts, then Freedom would be the larger term, since the area of Freedom (non-constrained or non-constraining acts) is a larger area than that of Law (constrained or constraining acts).

27. Art. 194, German Civil Code, contains an indirect definition of the same idea: "The right (*Recht*) to demand an act or forbearance from another (*Anspruch*) is subject to prescription." Observe that here *Anspruch* (Claim) is a species, and Right (*Recht*) is the genus.

It is, we believe, a serious mistake to abandon the term Claim as the idea to be defined. It is a more serious mistake to attempt to confine the term Right to one juristic function. For centuries this term has been used in a generic sense for legal relations. It has also had various other applications. No other term, we believe, can be found which would better serve as a generic term for the dominant side of legal relations, and it is doubted whether even the influence of the Institute is powerful enough to confine its use in professional speech to the Claim-Duty relation.

The qualification "legally enforceable claim" goes too far. Where the rule of *Miller v. Dell*²⁸ prevails, a disseized owner of a chattel would still, after the running of the statute, have the right to take possession peaceably, although his claim of ownership would no longer be "legally enforceable."

§ 2. "A privilege . . . is a legal freedom on the part of one person as against another to do a given act or a legal freedom not to do a given act."

Our Comment. No definition could in appearance be more satisfying. Yet, not even a hundred years of interpretation would solve the problem of what it means. It tells us that a Privilege is a Legal Freedom.²⁹ Now what is a "legal freedom"? Freedom, as we understand it, is absence of constraint on the actor. Legal freedom may be taken to mean absence of *legal* constraint³⁰ (i.e., by way of duty or liability) on the actor. In that case a "legal privilege" would be exactly synonymous with "legal freedom." It is possible arbitrarily to state such meanings in disregard of customary usage.³¹ Legal terminology is a part of our language—the language of judges, practicing lawyers, legislators, and like groups not excluding even the lay public. The terminology of the mathematician, the engineer, the chemist, the physicist, may change and grow without affecting the language of the people, but it is different for legal terminology for the reason stated.³²

28. *Miller v. Dell* [1891] 1 Q.B. 468: "The property in chattels . . . is not changed by the Statute of Limitations though more than six years may elapse, and if the rightful owner recovers them the other cannot maintain an action against him." Cf. *Chapin v. Freeland*, 8 N.E. 123, 142 Mass. 383 (1886); Ames, *Lectures on Legal History* (1913) 202.

29. See note 22, *supra*.

30. Use of the term "legal" freedom suggests two other possibilities: "illegal" freedom and "non-legal" freedom.

31. That such meaning is arbitrary and that it is opposed to many centuries of customary usage will be shown.

32. It may, perhaps, be answered that we are dealing here not with legal terminology but with juristic terminology. Juristic terminology may be esoteric since it is only for the expert.

Since we are interested for the present only in discovering, if possible, the meaning of the definition, we may waive the question of usage.

The definition is followed by this illustration:³³ A leases to B land consisting of three parcels. B covenants that he will cultivate the first; and that he will not cultivate the second. There is no covenant as to the third parcel. It is said that B "has both the duty and the privilege of cultivating field one; he has both the duty and the privilege of not cultivating field two;" and "he has the privilege of cultivating and the privilege of not cultivating field three."

It now appears that the plausible assumption made above that Privilege and Freedom are equivalent falls. The reason is that constraint and Privilege as explained by the illustration may co-exist. How can B have a "legal freedom" to cultivate field one if he *must* cultivate that field. If B owes a duty he is not free. Hence the definition is incorrect—or have we given it the wrong interpretation, or is the illustration erroneous?

There can be no doubt. All the commentators on, and expounders of, the Hohfeld text agree that Duty and Privilege may coincide. Hohfeld himself clearly affirmed that Privilege and Duty are "perfectly consistent."³⁴ The illustration is correct, the interpretation was wrong, but the definition does not mean what it says.

We believe it is clear that the words "legal freedom" must be eliminated since constraint (Duty) and freedom (Privilege) are contradictory.³⁵ Are we driven back to the formula No Duty where Duty and No Duty would coincide as to the same act? Or is the solution No Duty Not to, which results in a trivial tautology?³⁶

33. 1 Restatement, Property, at 5-6.

34. Hohfeld, *op. cit.* supra note 22, at 39.

35. The following illustration may serve to emphasize the point: X is a prisoner in a penitentiary under sentence for life in solitary confinement. The warden goes to the cell of X holding in his hand the Property Restatement. The warden says to the prisoner: "X, from now on you will have a new privilege. You owe a duty not to break out of this penitentiary but from today you will have a privilege of not breaking jail! That is your new privilege."

36. If X owes a duty to do a given act, nothing is added in significance or meaning if we say that X does not owe a duty not to do the act. If the first statement is true the second is unnecessary. The second statement can not stand alone. Negative terms or negative propositions can not enter into the *content* of any science. Cf. Eaton, *General Logic* (1931) 315 et seq., 324. There is a vast difference between *content* of a science and statements about that content; the latter may be affirmative or negative.

We now venture to suggest that what Hohfeld meant and what the Restatement means by Privilege is not No Duty, not No Duty Not to, not Legal Freedom, but Lawfulness. The term Privilege appears many times in the Property Restatement.³⁷ We have made a reasonable effort to verify our hypothesis. We have found no contradictions. We believe it is correct.

On the assumption we have made, the definition should read:

§ 2. PRIVILEGE. A privilege to do a given act or not to do a given act means that it is lawful so to act.

The Hohfeld table of correlations now will read:

(1)	(2)	(3)	(4)
Claim ³⁸	[No Claim]	Power	No Power
Duty	Lawful (ness)	Liability	No Liability

It will be observed that the term, Lawful, does not have a correlative. Lawful is a term of quality. It is not a subject but a predicate.³⁹ Some terms do not have correlatives. "Lawful," or "lawfulness" is an absolute term. Absolute terms are the *in rem* ideas of logic. Parent necessarily points to Child, but "lawful" or "lawfulness" points to nothing outside itself.⁴⁰ It would seem, therefore, that since the idea of "lawfulness" can be applied to duties and powers, and can not be applied to "no-powers," that it must be eliminated from a table of terms based on correlation.⁴¹

This does not mean, however, that the words Privilege and Lawfulness are to be abolished. Both must be preserved. They are not equivalent terms in meaning and even if the American Law Institute had the power to impose them upon the legal pro-

37. In Vol. I, the term Privilege is used in 26 black letter sections as follows: 2, 5, 49, 50, 69, 70, 73, 79, 80, 86, 89, 91, 117, 119, 120, 121, 122, 123, 124, 129, 133, 139, 142, 143, 144, 145. In Vol. II, the term Privilege is used in 8 black letter sections as follows: 189, 195, 196, 201, 202, 206, 216, 219. The term is used in 166 black letter sections, lettered comments, and numbered illustrations. We estimate that the term is used altogether in these two volumes about 350 times. The writer is indebted to Prof. A. James Casner for his courtesy in furnishing a complete list from which the above enumerations and estimate are made.

38. Hohfeld himself said: "If, as seems desirable, we should seek a synonym for the term 'right' . . . perhaps the word 'claim' would prove the best": op. cit. supra note 22, at 38.

39. It could be turned into a subject by a slight change, to read, Lawfulness.

40. Cf. Eaton, op. cit. supra note 36, at 315.

41. Suppose the task is to state the species of rectilinear plane figures. The following enumeration would be accurate: three-sided, four-sided, five-sided . . . *n*-sided. The following enumeration would be defective: three-sided, four-sided, *rhomboids*, five-sided, not five-sided . . . *n*-sided. The following enumeration would be analogous to the method used in the Hohfeld table: three-sided, three-sided drawn in red ink (lawful), four-sided, not four-sided . . . *n*-sided. See Eaton, op. cit. supra note 36, at 282 et seq.

fession as equivalent, or as defined by the Institute, it would be a sin against the Holy Ghost to do so. We shall try to show in what follows that legal reasoning requires two words which the Institute seeks to merge into one word and one meaning. We shall also try to show that the constant meaning in technical common law from the beginning has been to regard Privilege as a *special legal advantage*. We shall also attempt to show that the common law technical use of the term Privilege has a value in legal analysis which would be obliterated if the Institute's proposal should by chance gain the favor of the legal profession.

Before we proceed, a digression must detain us. Since we first became familiar with this matter, now some twenty years ago, it has been a mystery, at least to us, why the term Privilege in the common law sense was mutilated beyond recognition for the sake of expressing the idea of "lawfulness." We suggested the hypothesis of negation as the explanation.⁴² We still believe that hypothesis is correct. But Hohfeld wanted a word with a correlative. He selected the term Privilege, without attempting to define it. It probably did not occur to him that whether the meaning was No Duty, No Duty Not to, Freedom, or Lawfulness, there could be no correlative either because the meaning was purely negative in content or that the meaning as expressed resulted in an absolute term which can have no specific correlative. In a word, the question is why did he not use the word Lawful or Lawfulness instead of Privilege with an aborted meaning? There was then no need of invention or mutilation. Nor is there such a need today. On this question there need no longer be any doubt. The question is one that admits of overwhelming proof of the correct answer. The American Law Institute in these two volumes has used the term Privilege about 350 times.⁴³ The interested reader can determine for himself whether the idea of "lawful"⁴⁴

42. Handbook of the Association of American Law Schools (1920) 184 et seq.

43. See note 37, *supra*.

44. For illustration we set out § 122: "When the owner of an estate for life has placed a fixture upon the land in which his estate exists, then such owner, or, after his decease, his personal representative *has the privilege*, at any time within a reasonable period after the end of the estate for life, to remove such fixture, except where the estate for life was ended by the conduct of the owner." (Italics supplied.)

An inquiry based on logic is likely to be found dull, but here the gentle reader may find something very amusing if he only looks closely. It reminds one of the question that was put to law students a generation ago, so the legend runs, in the state of Michigan. The question was: "What is the remedy if the life tenant holds over?" The keyed answer was: "Call the undertaker." Cf. Restatement, Property, §§ 121, 122.

or "lawfulness" can or can not successfully be substituted in each instance where Privilege is used.⁴⁵

The term "privilege" is an ancient law word. According to Cicero it appeared in the Twelve Tables (*circa* 450 B.C.).⁴⁶ In that era "privilege" meant not as today a special legal advantage or right but a special statute imposing a legal disadvantage or "liability."⁴⁷ Long before the time of Justinian, "privilege" had come to mean a law which provided an exemption from the general rule.⁴⁸ Later, in Roman law,⁴⁹ and in the civil law, "privilege"⁵⁰ was applied not alone to laws but also to rights.⁵¹ Every treatise on Roman law and all the pandect books deal with privilege, and it is beyond doubt that the uniform and constant meaning is that of "special advantage" and not mere "absence of duty."

45. It should go without saying that the sentence structure would often need to be changed to make the necessary substitution. It may be noticed that while Duties are always lawful, powers are lawful or unlawful. It seems, no doubt, an oddity that there can be *unlawful* powers, but it is true, nevertheless throughout the law that wrongdoers can produce legal consequences with more striking and obvious effects than rightdoers. Whether unlawful powers should be denominated *legal* relations is another question. In the Hohfeld system that question does not seem to have been considered but the distinction was at least recognized and it gave rise to the uncouth locutions "privileged conduct" and "unprivileged conduct." For an example of "unprivileged conduct," see Restatement, Property, § 206(c).

46. "*Privilegia ne irroganto: de capite civis nisi per maximum comitatum ollosque, quos censores in partibus populi locassint, ne ferunt.*" Cic. de Leg. II.4.19.

47. 10 Aulus Gellius, Noctes Atticae, 20. See also 1 Dirksen, *Civilistische Abhandlungen* (1820) 247 et seq.; 8 Weiske, *Rechtslexikon*, 492 et seq.

48. Hohfeld was not unaware of this usage. He quotes Mackeldy's Roman Law which clearly states the use as "*ius singulare*": Hohfeld, *op. cit.* supra note 22, at 44. Hohfeld then goes on to say that "the English word 'privilege' is not infrequently used in the sense of a special or peculiar legal advantage." A brilliant and versatile writer in speaking of Hohfeld's attempt to give the term "privilege" the meaning of "*absence of duty*" recently asserted that Hohfeld had cited "legal warrant enough for the use of the word in that sense": Radin, Hohfeld Restated (1938) 51 Harv. L. Rev. 1148. We have taken the pains to re-examine Hohfeld's essay and we have failed to discover satisfactory evidence that there is or ever was any such usage except in one case, namely that of so-called fundamental rights which is a non-technical and purely historical usage.

49. See Salkowski, *Institutes and History of Roman Private Law* (Whitfield's trans., 1886) 14 et seq.

50. Windscheid's editor points out the following sections of the German Civil Code dealing with "privileges": 3, 22, 80, 795, 1723: Windscheid, *op. cit.* supra note 13, at 688. It is interesting to find that in none of these sections is the word "privilege" used. The privilege is always expressed in other language.

51. One of the most common instances is the preferential right or lien of creditors in modern civil law. See 1 Domat, *Civil Law* (Strahan's trans. 1850) 680. In this case the "right" is a "claim" having as its correlative "duty": The Underwriter, 119 Fed. 713, 715 (D.C.D. Mass. 1902); The Dolphin, 7 Fed. Cas. 862, 864 (D.C.E.D. Mich. 1902); Carroll v. Bancker, 43 La. Ann. 1078, 1194, 10 So. 187, 194 (1891); Robinson v. Mut. Res. Life Ins. Co., 182 Fed. 850, 853 (C.C.S.D.N.Y. 1910); Ott v. Creditors, 127 La. 827, 54 So. 44 (1911).

In England, the term "privilege" was in use soon after the Conquest.⁵² The French word was and is the same. The law dictionaries⁵³ and the digests⁵⁴ from the beginning are in accord that "privilege" is an exemption, and it follows that even where the term is not qualified by "special" or other like term, that meaning is necessarily implied.

It is a somewhat curious fact that from the beginning, the terms "immunity"⁵⁵ and "privilege"⁵⁶ were often confused in meaning and in application. What in Comyns Digest is called a "'privilege' to be free from arrest" today in the parlance of the courts probably would be called "immunity from arrest." Both terms express the idea of exemption. Immunity is an exemption from the act of another; privilege is an exemption from an act to another (e.g., privilege of deviation, privilege to refuse self-incrimination). This distinction is one of late development in legal language.⁵⁷

In constitutional law, there is found an entirely special and

52. It appears in the *Angren Rthle* (Dorsetshire, c. 1200, J. Morton ed. London 1853); in Dan Michel's *Ayenbite of inwyrt* (Kent 1340, Morris ed. London 1866). See Stratmann, *Dictionary of Old English* (3rd ed. 1878) s.v. Privilege.

53. Thus the *Law French Dictionary* by F. O. (London 1701) states the meaning as *ius singulare* or exemption. *Termes de la ley* (London 1721) states that privileges are liberties and franchises granted to an office, place, town, or manor by the King's Great Charter. There are also privileges of the Commoners and of the peers of parliament, etc. Marriot's *Law Dictionary* (vol. III, 1798) states that privilege is a *ius singulare*—"an exemption from some duty, burthen, or attendance." See also, *Burn's New Law Dictionary* (Dublin 1792); *Jacob's Law Dictionary*, Vol. V, pp. 287-295. The latest edition of *Wharton's Law Lexicon* (14th ed. 1938) commences by saying Privilege is "an exceptional right or advantage." It quotes from an ancient case from Bultsrode's K. B. reports: "*Privilegium est quasi privata lex*:" Dominus Rex and Allen v. Tooley, 2 Buls. 186, 189 (1614).

54. 7 Comyns Digest of the Laws of England (5 ed. 1822) 112, s.v. Privilege, digests cases dealing with "privilege to be from arrest," with "privilege to be excused from office," and with "privilege in suits." See also, 8 Matthew Bacon's *Abridgement of the Law* (new ed. 1854) 158-205, where at considerable length the case applications are entered.

55. In Justinian's Digest one whole title is devoted to Immunity (D.5.6: *De iure immunitatis*) dealing with exemption from office, military service, and taxation. The term seems to be derived from "*munus*" meaning an office or function, service or favor, gift, etc. There are various related words such as "*munis*" (complaisant), "*munitus*" (fortified), "*munia*" (official duties).

56. "*Privilegium*" (*privus, lex*) has a clear advantage over "immunity" in affording a certain meaning of its origin. In the Digest some of the numerous applications are not easy to distinguish from "immunity." See Heumann, *Handlexikon zu den Quellen des römischen Rechts* (8th ed. by Thon, Jena 1895).

57. Even today these terms are still often confused nor are they used in all their allowable applications. We have not found either the word "privilege" or "immunity" in the German Civil Code. In the Jenks Digest of English Civil Law (3rd ed. 1938) the term "immunity" does not seem to be used, and the term "privilege" is employed only in defamation.

unusual application of the terms "privilege" and "immunity."⁵⁸ According to Blackstone, the primary end of human laws is to maintain and regulate the "*absolute* rights" of individuals by which is meant "such as would belong to their persons merely in a state of nature."⁵⁹ These absolute rights are "denominated the natural liberty of mankind. . . . But every man, when he enters into society, gives up a part of his natural liberty, . . ." and what results is "political or civil liberty."⁶⁰ "The absolute rights of every Englishman, (which, taken in a political and extensive sense, are usually called their liberties), . . . are founded on nature and reason."⁶¹

On the basis of this analysis of "absolute rights" and "civil liberty," Blackstone then formulated the following statement: "The rights themselves . . . consist in a number of private immunities; which . . . appear . . . to be indeed no other, than that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals."⁶² "And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property."⁶³

We have here one of the cornerstones of the political theory of the age in the background of the Constitution which assists in explaining the meaning of constitutional "privileges" and "immunities."⁶⁴ The cases which have given application to these terms in constitutional law are abundant.⁶⁵ As used in the federal Con-

58. In the Constitution of the United States these terms appear in the following places: Art. I, § 6 ("be privileged from arrest"); Art. I, § 9 ("privilege of the writ of habeas corpus"); Amendment IV, § 2 ("citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"); Amendment XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States").

59. 1 Blackstone, Commentaries on the Laws of England *124.

60. 1 id. *125.

61. 1 id. *127.

62. 1 id. *129.

63. Ibid. This statement looks like a *circulus in definiendo* but it makes sense. Rights have two divisions: Immunities (the residue of natural liberty) and Privileges ("rights" created by law).

64. It may be noticed that this usage is not in accord with the Restatement's definition of "privilege."

65. See *Corfield v. Coryell*, 4 Wash. C.C. 371, 380, 6 Fed. Cas. 546, 551 (1823); *Slaughter-House Cases*, 83 U.S. 36, 21 L.Ed. 395 (1873); *Butcher's Union Slaughterhouse v. Crescent City*, 111 U.S. 746, 765, 4 S.Ct. 652, 658, 28 L.Ed. 585 (1884); *Maxwell v. Dow*, 176 U.S. 581, 595, 20 S.Ct. 448, 454, 44 L.Ed. 597 (1900); *Paul v. Virginia*, 75 U.S. 168, 180, 19 L.Ed. 357 (1869); *Minor v.*

stitution and in state constitutions, these terms have no significance for private law and are purely historical and political in meaning.⁶⁶

An examination of American cases, apart from the purely historical and political meaning employed in American constitutional law, shows for the term "privilege" a tenacious adherence to the usage of the older law dictionaries and digests with emphasis on the idea of special advantage or exemption. It also shows a tendency to confine "privilege" to certain favored legal situations (e.g., corporations, defamation, evidence, taxation, trades and occupations), and generally a failure to distinguish "privilege" from "immunity."⁶⁷ We have found no cases which

Happerset, 88 U.S. 162, 170, 22 L.Ed. 627 (1875); Walker v. Sauvinet, 92 U.S. 90, 23 L.Ed. 678 (1876); Ex parte Lockwood, 154 U.S. 116, 14 S.Ct. 1082, 38 L.Ed. 929 (1894); Hodges v. United States, 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 65 (1906); Hammer v. State, 173 Ind. 199, 89 N.E. 850, 851, 24 L.R.A. (N.S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034 (1909); Ferry v. Spokane P. & S. R. Co., 258 U.S. 314, 42 S.Ct. 358, 66 L.Ed. 635, 20 Am. L. Rep. 1326 (1922).

66. For a careful review of these ideas, see Philbrick, Changing Conceptions of Property in Law (1938) 86 U. Pa. L. Rev. 691, 713 et seq.

67. Some of these cases are here entered: The accepted meaning of "Privilege" is a peculiar advantage: Hopper v. Britt, 73 Misc. 369, 132 N.Y.S. 730 (4), (1911). A special enjoyment of a good or exemption from an evil: Wisener v. Burrell, 28 Okl. 546, 118 Pac. 999, 34 L.R.A. (N.S.) 755, Ann. Cas. 1912D 356 (1911). Exemption from jury duty: State v. Cantwell, 142 N.C. 604, 55 S.E. 820, 8 L.R.A. (N.S.) 498, 9 Ann.Cas. 141 (1906) (this example, from a juristic standpoint, is very interesting; instances of positive privileges are uncommon, but the usage is correct). See also Leatherwood v. Hill, 10 Ariz. 243, 89 Pac. 521 (1906). A right peculiar to a person, as applied to a corporation, synonymous with "franchise": Northwestern Trust Co. v. Bradbury, 112 Minn. 76, 127 N.W. 386 (1910). A privilege of mining coal: Saltsburg Colliery Co. v. Trucks Coal Co., 278 Penn. 447, 123 Atl. 409 (1924). Privilege of a foreign corporation to do business: Camden Fire Ins. Co. v. Haston, 153 Tenn. 675, 284 S.W. 905 (1926); State v. N. Y. Life Ins. Co., 119 Ark. 314, 171 S.W. 871 (1914). Privilege is a special right not enjoyed by all: Cope v. Flanery, 70 Cal. App. 738, 234 Pac. 845 (1925). Exemption of certain classes from inheritance taxes confers a privilege: State v. Yturria, 109 Tex. 220, 204 S.W. 315 (1918) (this exemption has two aspects: an immunity from assessment; a privilege of non-payment). A right is a claim for enforcement as distinguished from a "privilege" which releases one from a liability which he would otherwise bear in common with all other persons: State v. Grosnickle, 189 Wis. 17, 206 N.W. 895 (1926). A special exemption: Territory v. Stokes, 2 N.M. 161 (1881). A peculiar benefit or advantage, a right or immunity not enjoyed by others or by all: Lawyer's Tax Cases, 55 Tenn. (8 Heisk.) 565, 649 (1875). A peculiar advantage, an immunity: North River Steamboat Co. v. Livingston, 1 Hopk. Ch. 149, 203, 2 N.Y. Chan. 374, 394 (1824). A particular and peculiar benefit or advantage enjoyed by a person, company, or class beyond the common advantages of other citizens: Guthrie Daily Leader v. Cameron, 3 Okl. 677, 41 Pac. 635 (1895).

In its natural meaning "privilege" is a right peculiar to an individual or body: Ripley v. Knight, 123 Mass. 515 (1878); Doc. Lonas v. State, 50 Tenn. (3 Heisk.) 287 (1871); Dike v. State, 38 Minn. 366, 38 N.W. 95 (1888); Harrison Pepper & Co. v. Willis, 54 Tenn. (7 Heisk.) 35, 44 (1871); City of Brenham v. Brenham Water Co., 67 Tex. 542, 4 S.W. 143 (1887); Van Valkenburg v. Brown, 43 Cal. 43, 48, 13 Am. Rep. 136 (1872). Power to appoint dental examiners is

use the term "privilege" in the sense indicated by Hohfeld⁶⁸ or in the sense of the definition of the Property Restatement prior to the vigorous and highly influential campaign put in motion in the year 1917 by the Hohfeld group to fasten this terminology on the legal profession and on the courts. This effort may yet succeed.⁶⁹ Why this organized and powerful effort to substitute the word "privilege" for the word "lawful" was ever made is not easy to understand.

Summing up the foregoing discussion on the term "privilege," we have attempted to show:

1. That as applied to laws, the original meaning was that of special law (*ius singulare*). That as applied to rights the constant and consistent meaning of "privilege" in our law has been

a duty, not a privilege: *Ferner v. State*, 151 Ind. 247, 51 N.E. 360 (1898). (In the Restatement a "duty" may be a "privilege.") Privilege as distinguished from a mere power is a right peculiar to a person or a class of persons not possessed by others: *Int. Trust Co. v. Am. Loan & Trust Co.*, 62 Minn. 501, 65 N.W. 78 (1895). Right of debtor or widow to exemption is a personal privilege: *Commonwealth v. Henderson*, 172 Penn. 135, 33 Atl. 368 (1895). A right or immunity not enjoyed by others: *L. & N. R. Co. v. Gaines*, 3 Fed. 266, 278 (C.C.M.D. Tenn. 1880). Exemption from taxation is more accurately expressed by "immunity" than by "privilege": *Phoenix Fire and Marine Ins. Co. v. Tennessee*, 161 U.S. 174, 16 S.Ct. 471, 40 L.Ed. 660 (1896). An occupation not open to every citizen is a privilege: *French v. Baker*, 36 Tenn. (4 Sneed) 193 (1856); *Pullman So. Car Co. v. Nolan*, 22 Fed. 276 (C.C.M.D. Tenn. 1884). Right to use a union label is a privilege: *Schmalz v. Wooley*, 56 N.J. Eq. 649, 39 Atl. 539 (1898). See Words and Phrases for numerous other cases.

68. In *People v. Hayden*, 133 N.Y. 198, 30 N.E. 970 (1892), it was said that privilege is synonymous with right and it was held that a policeman is not removable except for cause and after a hearing. The case dealt with interpretation of a city charter. Cases of city charters, franchises, treaties, and contracts, frequently involve the meaning of "privilege." They stand apart from the remainder of the law and often, as in constitutional law, deal with "privilege" as a "fundamental" right.

69. That this program has already made headway is apparent in the opinions of certain state court judges and also in some opinions of the Supreme Court of the United States in recent years. It is possible that in another generation, the ancient word "privilege" will lose its etymological meaning and be freely used by lawyers as a synonym for "liberty" and "freedom", power, duty, right, and lawful. For this doubtful enrichment of our language a suitable price must be paid. That price will consist in the obliteration of the important common law meaning of "privilege" and in the degradation of the idea of liberty or freedom as an annex of law and not as heretofore something outside of the law.

Webster's New International Dictionary (2nd ed. 1935) now gives the following definition: "PRIVILEGE . . . JURISPRUDENCE: A condition of legal non-restraint of natural powers, either generally or on some particular occasion. The condition of general non-restraint is also called a liberty."

If, by chance, the author of this definition, thus conveniently inserted in a dictionary of considerable circulation, had in mind the meaning of "privilege" as used in the Restatement, he has erred. He should have said that "privilege" in the use made of that term by the American Law Institute is the quality of any act which is not unlawful. What actually the definition does is to give another definition of Blackstone's "immunity" (a residuum of natural liberty).

that of exemption or special advantage and that this is demonstrated overwhelmingly in English and American cases.

2. That the use made of "privilege" in the Restatement of Property shows in all of its application that the meaning of privilege is "lawfulness."⁷⁰ There was no need of invention. Other codes use the terms "lawful" and "unlawful" or other like terms where the need appears.⁷¹

3. That the term "right" is often used as a synonym for "liberty" or "freedom," but that there is no prior usage of the term "privilege" for "liberty" or "freedom" except in a historical or political sense (i.e., in constitutional law).

4. That the term "privilege" as defined and as used overlaps with other ideas, legal or non-legal, which express action. "Privilege" and "power" may coincide. "Privilege" and "duty" may coincide. "Privilege" and "freedom" or "liberty" may coincide. These terms not only coincide but they coincide in such a way that for any given instance of "duty," or "power," or "freedom," the term "privilege" may be substituted, so that in such cases we would know that the act is "lawful" or "unlawful" without knowing why. The term "privilege" clearly is not a fundamental (primitive or ultimate) idea. Hohfeld himself called it a "common denominator,"⁷² but, if it is a "common demoninator," it dif-

70. There are numerous instances in the Restatement where the words "privilege" and "power" are joined. See, for example, § 70: "... has the privilege and the power." The same idea could accurately be expressed by eliminating the term "privilege." If a power is conferred by law, may it not be assumed that it is lawful?

There is also the case (e.g., Restatement of Security, Tentative Draft No. 2, § 15(3)) where "the pledger has the power but not the privilege" to make a pledge (e.g., where the pledge res belongs to another). Could not this statement (5 lines) be more clearly phrased by stating that "when a pledger agrees to make a pledge, it is a partial breach of contract if the pledging is a violation of duty to another"? For this instance more than a page of comment and illustration are devoted to explanation of what should need no explanation. It would seem that many tons of paper have been necessary to make understandable the simple words, wrong, wrongful, lawful, unlawful, etc.

71. See Arts. 227, 228, 229, 1243, German Civil Code. There are numerous linguistic devices by which the ideas of lawfulness and unlawfulness can be expressed.

The Jenks Digest of English Civil Law (1938) treats the whole subject of English property law in a space of 526 pages including citations of authority, historical notes, and comment, dealing with land, chattels, choses in action, powers, servitudes, and trusts. The entire subject of English civil law is treated in a compass of two volumes of a total of 1258 pages. Apart from the obvious question of comparison, it will be of interest, also, to observe the methods of stating legal rules and especially so in respect of legal terminology. Suffice it to say that the Jenks Digest somehow manages without use of the Restatement's invention of a new meaning for "privilege."

72. "These eight conceptions, rights and duties, privileges and no-rights,

fers from such terms as "duty" and "power" which can not be broken down into simpler elements.⁷³

5. That the most serious objection is that the Restatement's use of "privilege" obliterates the significant meaning of "privilege" in the common law sense. The idea that an act is "lawful" would not explain the underlying technical operations and theoretical ideas of the common law "privilege." It is true that the "privileged" act would be "lawful" but it would require an illustration, a note, and a comment to explain in what way it is "lawful" where the common law term explains itself without the need of commentary.⁷⁴

Coming now to the term Immunity we have the *Wousin* discussed above. The definition given by the Restatement is:

§ 4. "An immunity . . . is a freedom on the part of one person against having a legal relation altered by a given act or omission to act on the part of another person."

It is not probable that this juristic *Wousin* would be confused with the *Gostok* called "privilege" since "privilege" is used to characterize the legal quality of an act while "immunity" is designed to state the result of acting. But it must be clearly understood that it is a result outside the field of reference (i.e., the law). Within the field of reference, it is a pure *Wousin* having no reality or significance. The legal formula is precisely: $O=O$. There is of course an operational idea called "no-liability." These

powers and liabilities, immunities and disabilities, seem to be what may be called the 'lowest common denominators of the law.' Hohfeld, *op. cit.* supra note 22, at 63.

73. This feature raises the interesting question whether the Restatement's system of legal relations does not reduce to Privilege with a double correlative as follows: Privilege (*relatum*) and Claim and Liability (*correlata*). Naturally, we do not insist upon this simplification, since we believe that "privilege" in the sense of lawful or lawfulness is an absolute term with no more of logical correlation than that of a wood-shed.

74. We may put as an example of the point made above, the case of an easement. To say that *A* may enter the land of *B*, that it is not unlawful to do so, would tell us nothing of the legal relations of the parties. We would have the legal result of the situation but no explanation of the cause of it. *A* may, perchance, have been pushed on *B*'s land by *C*, or *A* may have fallen on the land from an airplane without fault. Again, *A* may owe *B* the duty to enter *B*'s land. If, however, we say that *A* has a (common law) privilege to enter *B*'s land, the mist of indefiniteness concentrated in the idea of lawfulness is clarified. The clarification may not on that simple statement be ultimate as against easement or license, but it does exclude a large variety of other possibilities. Privilege in the common law sense is a convenience as a direction finder in legal relations, but Privilege in the sense of the Restatement excludes only unlawfulness. Furthermore, the idea of lawfulness does not imply the idea of conflicting rights necessarily raised by any common law "privilege," nor would it suggest the questions of theoretical difficulty and practical importance involved in such a conflict.

operational negatives are necessary in the communication of ideas but no art or science undertakes to translate a negative term into a positive term such as "immunity" or "disability." There are two bad results: the first is that a terminology not rich in appropriate word symbols, must be drawn upon to indicate what is legally insignificant;⁷⁵ the second is that legal terminology is unnecessarily burdened⁷⁶ in this case by old terms used in a new sense.⁷⁷ These are linguistic felonies.

On the question whether the American Law Institute is restating the traditional meaning of the term "immunity," the overwhelming majority of the courts give a negative answer.⁷⁸ The term is valuable and should not be thrown away. The Institute could have rendered constructive service by emphasizing its juristic function to distinguish it from privilege.⁷⁹

We approached this part of our task with much anticipation, not, however, of a favorable result but rather the expectation that usually out of nothing nothing comes. Immunity, as a purely negative legal result, can not submit to any significant legal manipulation. It is, as defined, an excluding idea. Aside from its operational necessity it represents not a something among the phenomena of law but a pure nothing.⁸⁰

75. The term "immunity," as we have seen, is one which goes back to Roman law. Its meaning there and ever since has been that of "exemption." This meaning is sacrificed for the new meaning "no (legal[?]) power."

76. Consider the result for legal terminology if this linguistic scheme were carried out. Our legal terminology would be doubled. If that idea can not be justified for law terms in general (e.g., person, act, thing, waiver, estoppel, warranty, sale, pledge, easement, and so forth) how can it be justified for the terms of legal relations?

77. It is a curious fact that the term "immunity" seems to have dropped out of use in modern Roman law. It is not mentioned in the Roman law treatises or the pandect commentaries. In the common law, it is often indicated as a synonym for "privilege" (common law sense) and of course generally in the historical and political sense in constitutional law: *Sacramento Orphanage & Children's Home v. Chambers*, 25 Cal. App. 536, 144 Pac. 317 (1914).

78. See *Ex parte Levy*, 43 Ark. 42, 54, 51 Am. St. Rep. 550 (1884); *Lonas v. State*, 50 Tenn. (3 Heisk.) 287, 306 (1871); *Dike v. State*, 38 Minn. 366, 38 N.W. 95 (1888); *Douglass v. Stephens*, 1 Del. Ch. 465, 476 (1821); *Long v. Converse*, 91 U.S. 105, 113, 23 L.Ed. 233 (1875); *Buchanan v. Knoxville & O. R. Co.*, 71 Fed. 324, 334 (C.C.A. 6th, 1895). Scores of other instances are collected in *Words and Phrases*.

79. For example: immunity from levy, immunity from taxation. In this sense, it is commonly used to indicate exemption from acts of public officers. Thus in *Phoenix Fire and Marine Ins. Co. v. Tennessee*, 161 U.S. 174, 16 S.Ct. 471, 40 L.Ed. 660 (1896), the court pointed out that exemption from taxation is more accurately expressed by "immunity" than by "privilege."

80. The answer usually made is that the courts will pronounce a judgment of "no power." This is true, but it is no warrant for calling "no power" a "disability" in any communications of ideas among lawyers. If a judge or a jury arrives at the conclusion that the plaintiff was not guilty of negligence,

We have seen that "privilege" appeared in thirty-four black letter sections;⁸¹ the term "immunity" appears in only nine black letter sections of the Restatement.⁸² In each one of these instances the term "immunity" is used in only a definitional sense as applied to estates in land and not in an operational sense to point out how one right is or may be weighed against another right. So far as concerns these instances, the term could be eliminated without detriment to what remains.⁸³ Like the word "immunity" itself, these sections are empty of meaning. However, in two sections⁸⁴ we encounter two operational uses of the idea. The title of section 149 reads: "Disability to assert interest acquired on sale, in derogation of future interest in same land." Here of course "disability" means "no-power." But in the legislative statement of the section we are told that the life tenant "acquires no interest which he can assert in derogation of the said future interest." Here the restater abandons the term "disability" for language more easily understood. In section 150 the same thing occurs. "Disability" appears in the title and is abandoned in the ensuing text. And this is the story of Immunity. It came from nothing and ended in nothing.

Some twenty-five years ago lawyers spoke of Rights and Liabilities, Rights and Duties, Duties and Powers, Powers of appointment, Liabilities for debt, Immunities from taxation or prosecution, Duties of trustees, Privilege against incrimination, and Disabilities of minors, and so forth.⁸⁵ The *cognoscenti* were aware

he or they stop there, and do not coin a new word, or borrow an old one, to take the place of "no negligence." We have been unable to discover any justification of the procedure which attempts to turn pure negatives into affirmative terms. There are two exceptions in physics: a "vacuum" and "space," both positive in meaning and negative in content. The symbol 0 in mathematics is treated as a number. We know of no law term where there is any convenience in using a positive term as a substitute for a negative idea. But it has been suggested that such a practice is convenient and affords enlightenment in the solution of legal problems. We submit that the expression "no-power" is psychologically easier to understand than the substitute word "disability." That being true, the substituted term does not promote any convenience. If, as we assume, the term "no power" is clearer to the understanding than "disability" (which, moreover, for this case, needs a special definition to confine it to no-power) it follows that this method can not produce greater enlightenment, since enlightenment is based on understanding.

81. See note 37, *supra*.

82. In Vol. I: §§ 4, 5, 124; Vol. II: §§ 187, 190, 191, 192, 195, 196. See also §§ 149, 150.

83. With the exception, of course, of § 4, which states the definition.

84. Restatement, Property, §§ 149, 150.

85. An examination of Jenks's Digest (1838) indicates fairly well the professional practice in the use of juristic terms.

that often these terms of art were not terms of logical precision. Then suddenly there appeared a peculiar ritual designed to shorten the creaking motion in the joints of legal terminology. We were now forbidden to say that we had a "right" to do anything whatsoever—no, not even the "right" to enter one's own home. The ritual word for going home became "privilege." Of course, there was also the "privilege" of not going home, of not breaking jail, of not picking pockets, or of not trespassing on land. This ritual also required (at least such was the practice) that the devotional word "right" must not be used alone but must be the initial symbol of a liturgical litany which runs as follows: Right, Privilege, Power, and Immunity.⁸⁶ The high priests of this cult wrote down on every page of their pontifical texts and chanted with unceasing zeal in their devotions the inspired deliverance of truth—"Rights, Privileges, Powers, and Immunities—they are wonderful!" This was the Great Litany which if properly intoned might well have fitted the sacramental ceremonies of a Buddhist monastery.⁸⁷ There are also the lesser litanies of "privilege"⁸⁸ and "power"⁸⁹ and of other combinations.

What will become of these adventures in legal terminology can not be predicted, but we believe that acceptance of these nov-

86. See, for example, Restatement, Property, §§ 5, 117, 124, 187, 191, 195, 196, 219; there are numerous other instances.

87. The existence of the Great Litany is abundantly demonstrated in certain textbooks, law review articles, and case comments published twenty years ago.

88. It needs to be stated that the term "privilege" is frequently used in the Restatement in the orthodox common law meaning, but as we have pointed out, when this occurs the fact is concealed by the generality of the idea of "lawfulness." See note 74, *supra*.

89. One of the problems raised by the "lesser litanies" is the doubt whether other terms should not sometimes be added. If other terms of the series are omitted would it not have legislative significance if the Restatement were considered as an official code? This method of drafting not only raises a difficult problem but also presents a very serious question of expediency. We are inclined to believe that in general it would be better practice to refer to Rights, in general, rather than to attempt an exact enumeration of the particular species of Rights involved, especially in a system of terms based on negative as well as positive ideas. To require of the draftsman complete analytical treatment of each legal rule puts on him a burden greater than even the expert should bear. As pointed out in the beginning, that method of analytical statement in juristic terms is a highly unique feature in legislative drafting. No code has ever before attempted it. One may consider by way of comparison the rugged and forthputting declarations of the German Civil Code or of the Jenks Digest, alongside the curiously strange pronouncements found in much of this Restatement.

elties in negation⁹⁰ will not further jurisprudence⁹¹ nor make more comprehensible the phenomena of state justice.⁹²

90. This point should be emphasized. It has other outcrops in the Restatement. Thus, a "conveyance" is defined to include what is not a conveyance (§ 11). Again, a "devise" is defined to include a void testamentary act of "devise" (§ 12).

91. Objections to other features of the terminology of the Restatement are reserved for separate discussion.

92. A distinguished authority on land law in a recent book review of the Property Restatement said: "The adoption of a jurisprudential terminology, thought by many to have seen its best days or to be dying if not dead at the time of its adoption, the new classification of remainders, and finally the quasi-legislative form of its utterances are among those things responsible for that strangeness and tediousness which we noted at the outset." Bordwell, Book Review (1938) 51 Harv. L. Rev. 565, 570.

Coercion of Third Parties In Labor Disputes--The Secondary Boycott

J. DENSON SMITH*

If A assaults B while the latter is walking down the street, ordinarily no one but B can complain. However, if B is on his way to C's store to make a purchase and A's assault causes C to lose a sale, the latter's position must be considered. The mere fact that the wrong committed against the prospective customer results in the store owner's losing a sale would, we may agree, not be a sufficient showing to entitle the latter to any relief, but a different situation would be presented if the owner could show that the act directed against the third party was used as a means of injuring him.¹ If we assume, therefore, that a labor union is having a legitimate dispute with an employer, and, believing that if it can divert his patronage it may force him to accede to the union demands, successfully commits a personal attack on a prospective customer, the question is, does this attack on the customer infringe the employer's legal rights? Before seeking an answer to this question, let us suppose that, instead of resorting to violence, the union undertakes peacefully to persuade the customer not to favor the employer with his patronage. We must then inquire whether peaceful persuasion will violate the latter's legal rights. In proceeding to solve these problems two primary questions arise. First, is the matter of compulsion directed at the employer, and second, compulsion directed at the third party.

Undoubtedly, any compulsion directed at the employer may result in a serious interference with his liberty of action. But we now know that the liberty which he enjoys in the conduct of his business is not unlimited with respect to labor. Merely that he may be compelled by the conduct of the union to grant concessions which otherwise he would not grant is not enough to entitle him to any relief. This means, of course, that the union is legally

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1. For a discussion of the significance of motive see Holmes, *Privilege, Malice and Intent* (1894) 8 Harv. L. Rev. 1; Ames, *How Far an Act may be a Tort because of Wrongful Motive of the Actor* (1905) 18 Harv. L. Rev. 411; Walton, *Motive as an Element in Torts in the Common and in the Civil Law* (1909) 22 Harv. L. Rev. 501; Lewis, *Should the Motive of the Defendant Affect the Question of his Liability* (1905) 5 Col. L. Rev. 107.

privileged to destroy, if it can, the employer's freedom of choice between granting its legitimate demands or rejecting them, a privilege which rests on the feeling that the struggle between employers and employees is but one aspect of the theory of free competition to which any individual's liberty to conduct his business as he sees fit is constantly subjected.²

If conduct which may compel an employer to act against his will may be justifiable, this raises the question whether there are any limits to the manner in which such compulsion may be brought about. More particularly the inquiry would be whether in seeking to compel the employer the union may undertake to divert his customers. However, to avoid an unnecessary limitation, other attacks on his business should be included, for having customers is not the only contact necessary to its successful prosecution. For him to have available sources from which he can draw his raw materials and his labor is perhaps just as necessary, and a thrust at these sources may interfere with his business and his liberty just as much as diversion of his patronage. The attack, in all these cases, would be centered on his business contacts, his markets, and would constitute an effort to stifle them. In keeping with the practice where attempts to cut off patronage are involved, the term "boycott" may be applied appropriately to conduct of the kind indicated, for he is "boycotted" just as clearly when an effort is made to destroy his labor market or the source on which he depends for raw materials as he is when the attempt is to cut off his supply of customers.³

Returning to the question concerning the kind of compulsion that may be used against the employer, the legality of peaceful persuasion, whether it is directed at employees or those having other business dealings with him, present or prospective, is no longer open to serious question.⁴ If peaceful persuasion is thus

2. See Frankfurter and Greene, *The Labor Injunction* (1930) ch. 1, where the authorities are collected.

3. "The boycott may, therefore, be defined as a combination formed for the purpose of restricting the markets of an individual or group of individuals." Wolman, *The Boycott in American Trade Unions*, 34 *Johns Hopkins University Studies* (1916) 9, 12. For a consideration of other definitions of the term see, *id.* at 10, 11; Frankfurter and Greene, *op. cit. supra* note 2 at 42, 43; Sayre, *Labor and the Courts* (1930) 39 *Yale L. J.* 682, 699. In *Gill Engraving Co. v. Doerr*, 214 *Fed.* 111, 119 (D. C. S. D. N. Y. 1914), Hough, J., remarked, "I do not perceive any distinction upon which a legal difference of treatment should be based between a lockout, a strike, and a boycott. They often look very unlike, but this litigation illustrates their basic identity. All are voluntary abstentions from acts which normal persons usually perform for mutual benefit. . . ."

4. See, particularly, *American Steel Foundries v. Tri-City Central Trades*

eliminated our question is reduced to the legality of an attempt to compel third parties to act against the employer. In the light of the finding that the latter is not free from coercive practices, why his case should be any different if the third person is compelled, rather than persuaded, not to deal with him, may be wondered. Clearly, as far as the employer is concerned, whether peaceful persuasion or personal assault is employed, the result, if accomplished, will be exactly the same. He will lose a sale. However, the obvious difference between persuasion and compulsion is that in the first case nothing occurs to deprive the customer of voluntarily choosing between buying and not buying from the offending employer, whereas in the second the assault is an obstacle to the exercise by the former of a free will in the matter. In short, peaceful persuasion does not interfere with the customer's liberty but compulsion does. Yet how does this concern the employer?

Granting that, in order for a court of equity to be justified in issuing an injunction to restrain a combined attempt to interfere with one's liberty, there must be a finding that the end sought is unlawful or the means employed are unlawful, then, if the employer is allowed to complain of the union's assault on the customer, one of these elements must be present. The scope of this paper does not permit of a general inquiry concerning the ends for which labor may employ its weapons. The lawfulness of the end with respect to the party with whom the dispute exists will therefore, in general, be assumed. The present inquiry is thus narrowed to the legal nature of the means. Although a personal assault has been used in the illustration, it may be well to recognize at this time that violence of any kind has no proper place in a labor dispute as is generally true of the whole field of the law. The same, of course, can be said of fraud or misrepresentation. The removal of these methods of attack leaves available for consideration only conduct that is honest and peaceful. In order, therefore, to make the illustrative case more useful the assault must be elim-

Council, 257 U.S. 184, 209, 42 S.Ct. 72, 66 L.Ed. 189 (1921); *My Maryland Lodge No. 186 of Machinists v. Adt.*, 100 Md. 238, 59 Atl. 721, 68 L.R.A. 752 (1905); *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 77 N.W. 13, 42 L.R.A. 407, 74 Am. St. Rep. 421 (1898); *Perfect Laundry Co. v. Marsh*, 120 N.J. Eq. 508, 186 Atl. 470 (1938); *Goldfinger v. Feintuch*, 276 N.Y. 281, 11 N.E. (2d) 910 (1937). See also, *Frankfurter and Greene*, op. cit. supra note 2, at 31-34; *Hellerstein, Picketing Legislation and the Courts* (1932) 10 N. C. L. Rev. 158; *Eskin, The Legality of "Peaceful Coercion" in Labor Disputes* (1937) 85 U. Pa. L. Rev. 456; and Note (1920) 6 A.L.R. 909, where the cases are collected. Of course, some courts refuse to believe there can be such a thing as peaceful picketing. See generally, *Sayre, Labor and the Courts* (1930) 39 Yale L. J. 682, 701, 703; *Cooper, The Fiction of Peaceful Picketing* (1936) 35 Mich. L. Rev. 73.

inated and some form of non-violent compulsion substituted. Obviously, the third party may be compelled to pursue a certain course of conduct if the alternative is to suffer some loss. Such a loss may result from interference with his normal relations and contacts. Therefore we may assume instead that the union undertakes to compel him to act against the offending employer by interfering through peaceful means with his normal business relations, such as by undertaking peacefully to divert also his patronage. Having in mind the statement previously made that peaceful persuasion is legal, if peaceful persuasion of the neutral's customers is attempted, may it fairly be said that the union is using unfair means against the employer? It is believed that this question can and should be answered in the affirmative.

Viewing the problem solely from the standpoint of the neutral, the effort on the part of the union to dissuade prospective customers from dealing with him constitutes, under the definition mentioned above, an illegal conspiracy. This is so, because although, as to him, peaceful persuasion of his customers is a lawful means, the combined interference with his patronage by whatever means, since he is a neutral, cannot be justified. In short, the conduct lacks a lawful end because there is an absence of any relationship between him and the union members which would justify them in undertaking to coerce him to do their bidding.⁵ And since interference with his liberty of choice is at once the end of the attempt to destroy his patronage and the means used to force compliance by the employer, the end from the standpoint of the neutral is the means as to the employer. Therefore, that which is illegal as an end against the neutral remains illegal as a means against the employer.⁶

5. Of course this statement will not hold true of the minority jurisdictions which permit the direct focusing of coercion on a neutral. *Empire Theatre v. Cloke*, 53 Mont. 183, 163 Pac. 107, L.R.A. 1917E 383 (1917); *Pierce v. Stablemen's Union, Local No. 8760*, 156 Cal. 70, 103 Pac. 324 (1909). Cf. *Geo. J. Grant Const. Co. v. St. Paul Building Trades Council*, 136 Minn. 167, 161 N.W. 520 (1917).

6. This form of analysis, although not clearly stated, may be discovered in the opinion of Shaw, J., in *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027, 1044, 21 L.R.A. (N.S.) 550 (1908) "... the use of undue influence to compel or bring about the action of one person to the injury of a third person is the use of illegal means to that end (i.e., coercion of the customer is an illegal means against the employer). . . . The principle settled by the cases cited, however, is that, while men have a right by that (lawful) means to coerce their employers (customers of the struck employer) so as to compel them to act to the injury of a third person . . . it is the control of another's conduct against his will that is the unlawful element in the proposition (i.e., the end is unlawful). This being unlawful, the resulting injury to a third person is unlawful, although every other act in the trans-

The foregoing, of course, is the legalistic way of saying that, according to generally prevailing notions, it is socially undesirable for the employer to have to suffer such tactics and also socially undesirable for the third party to be laid open to such attacks.⁷ Perhaps the feeling is that as long as the fight is a fair fight between the union and the employer, may the better man win, but that non-disputants should be left free to choose their side and should not be forced to aid in the fight against their will. Freedom to choose is the life of competition for the choice; without it competition cannot exist. At any rate, that deprivation on the part of a neutral of freedom of choice, untrammelled by compulsion, is the essential ingredient of that practice to which the term "secondary boycott" ought to be applied, should here be emphasized.⁸ This is the practice that the law generally does not countenance. To approach the problem in such fashion should help to focus the attention on the character of the acts themselves rather than on the symbol under which they are outlawed. The law condemns a particular kind of conduct, whatever its name, not the name itself.⁹

There does not follow from the foregoing, however, the proposition that whenever pressure is brought to bear on a neutral, in

action is lawful in itself" (i.e., since controlling the conduct of the customer against his will is unlawful, the resulting injury to the employer is unlawful, although the conduct involved is lawful *per se*). It was also used in *Parker Paint and Wall Paper Co. v. Local Union No. 813*, 87 W. Va. 631, 105 S.E. 911, 914, 16 A.L.R. 222 (1921): "And the use of such means (peaceful bannering) against one's customers in order to *coerce them* to compel him to comply with demands made on him by the union is an unjustifiable interference with the *rights of such customers*. Martin's Mod. Law on Labor Unions 77." See also, *Casey v. Cincinnati Typographical Union No. 3*, 45 Fed. 135 (C.C.S.D. Ohio, 1891); *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803 (C.C.S.D. Ohio, 1894); *Albro J. Newton Co. v. Erickson*, 70 Misc. Rep. 291, 126 N.Y. Supp. 949 (1911). (Matter in parenthesis and italics supplied.)

7. A good statement of this view appears in *Iron Moulders' Union No. 125 v. Allis-Chalmers Co.*, 166 Fed. 45, 51, 20 L.R.A. (N.S.) 315 (C.C.A. 7th, 1908).

8. "A boycott may be defined to be a combination of several persons to cause a loss to a third person by causing others against their will to withdraw from him their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons forming this combination, will cause loss or injury to him. . . . Intimidation and coercion are essential elements of a boycott. It must appear that the means used are threatening and intended to overcome the will of others and compel them to do or refrain from doing that which they would or would not otherwise have done." *Gray v. Building Trades Council*, 91 Minn. 171, 97 N.W. 663, 666, 63 L.R.A. 753, 103 Am. St. Rep. 477 (1903). See also, *Meier v. Speer*, 96 Ark. 618, 132 S.W. 988, 990-991, 32 L.R.A. (N.S.) 792 (1910); *Bricklayer's, etc. Union v. Seymour Ruff & Sons, Inc.*, 160 Md. 483, 154 Atl. 52, 83 A.L.R. 448 (1931); and *Pickett v. Walsh*, 192 Mass. 572, 78 N.E. 753, 6 L.R.A. (N.S.) 1067 (1906).

9. "Names are not things. It is the thing done or threatened to be done that determines the quality of the act, and this quality is not changed by applying to the acts an opprobrious name or epithet." Caldwell, J., dissenting, in *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 924 (C.C.A. 8th, 1897).

order indirectly to compel action by an employer, an illegal secondary boycott is involved. The simple case of an individual withholding his patronage from a retailer because the retailer deals with a manufacturer with whom the individual has a grievance is an illustration. Clearly, if an individual does not choose to deal with a retailer because he feels that the support which the retailer is giving to a manufacturer is an aid to the latter in successfully resisting demands made upon him, or indeed, for whatever reason, the individual acts with legal freedom. But, granting that this is true, by expanding this method of attack, two principal questions are raised: First, how far may labor combine in a withdrawal of its own patronage, and secondly, how far may labor go in inducing others to withdraw their patronage? These questions, of course, involve the common law conspiracy.

The conspiracy problem cannot be solved by simple logic. Because one individual may be privileged to buy or not to buy from a particular person, that a number of individuals acting in combination are likewise free to withhold patronage, does not necessarily follow.¹⁰ The question here considered is an old one and has been much discussed since the time when the indictment for criminal conspiracy was the chief weapon of employers to prevent concerted action on the part of employees.¹¹ The problem always is: how can conduct lawful as to an individual become unlawful merely because participated in by a group or combination of individuals? Discarding the logical mirage which beckons, the reason for this is simple enough. Freedom of the individual to deal or not to deal with whom he chooses, to favor with his patronage or to withhold it, is the bulwark of our philosophy.¹² So

10. To pursue such logic will lead to holding a secondary boycott lawful [*Empire Theatre v. Cloke*, 53 Mont. 183, 163 Pac. 107, L.R.A. 1917E 383 (1917)], or to an even less tenable position [*Alfred W. Booth & Bro. v. Burgess*, 72 N.J. Eq. 181, 65 Atl. 226 (1906)].

11. See generally, Brigham, *Strikes and Boycotts as Indictable Conspiracies at Common Law* (1887) 21 Am. L. Rev. 41; Wyman, *The Law as to Boycott* (1903) 15 Green Bag 208; McWilliams, *Evolution of the Law Relating to Boycotts* (1907) 41 Am. L. Rev. 336; Sayre, *Criminal Conspiracy* (1922) 35 Harv. L. Rev. 393; Hellerstein, *supra* note 4, at 166; Sayre, *Labor and the Courts*, *supra* note 4; Jaffin, *Theorems in Anglo-American Law* (1931) 31 Col. L. Rev. 1104; Pollock, *The Law of Torts* (10th ed. 1916) 334 et seq.; Note (1920) 6 A. L. R. 909, where a large number of the cases are collected and discussed.

12. Notice that the reference here is to negative conduct, not affirmative. As to the individual's position with regard to the latter see, *Carpenters' Union v. Citizens' Committee*, 333 Ill. 225, 164 N.E. 393, 63 A.L.R. 157 (1928); *Harvey v. Chapman*, 226 Mass. 191, 115 N.E. 304, L.R.A. 1917E 389 (1917); *Roraback v. Motion Picture Machine Operators' Union of Minneapolis*, 140 Minn. 481, 168 N.W. 766, 3 A.L.R. 1290 (1918); *Seubert, Inc. v. Reiff*, 98 Misc. 402, 164 N.Y. Supp. 522 (1917); *Delz v. Winfree*, 80 Tex. 400, 16 S.W. 111, 26 Am. St. Rep. 755 (1891). See also *Tuttle v. Buck*, 107 Minn. 145, 119 N.W. 946,

essential is it considered that its exercise is open to no inquiry. Whether the motives which direct the individual's choice would appeal to the run of men as reasonable or unreasonable, fair or unfair, is of no importance. They are not to be judged by any jural standard. Because of this philosophy the individual is said to enjoy a personal privilege in this regard. But this is a privilege to act individually. Consequently its existence does not solve the question of privilege in respect of a combination of individuals. When concerted action occurs great damage may be done, the injurious effect of which on society makes necessary a limitation on the exercise of group freedom.¹³ It is quite unnecessary and logically unsound to identify the individual with the group, to find in the group nothing but individuals in isolation. Is the bite of a rattlesnake only the personal conduct of an atom?¹⁴ The harm which may result from a societal standpoint as a consequence of action by an individual may be so trifling when weighed against the individual's personal freedom as not to cause any judicial alarm, but concerted action may so enlarge its extent that it can no longer be treated as socially inconsequential. Then an aroused judiciary begins to establish limits. The additional ingredient which may be isolated under the term "conspiracy" or "combination" is an aid to delineation but the judicial problem necessarily calls for a balancing of interests.

Interference with the Third Party's Patronage

Since the problem is one where the interests of labor are to be weighed against the harm which may occur to another directly,

22 L.R.A. (N.S.) 599 (1909); *Dunshee v. Standard Oil Co.*, 152 Iowa 618, 132 N.W. 371, 36 L.R.A. (N.S.) 263 (1911).

13. "Individuals may work for whom they please, and quit work when they please, provided they do not violate their contract of employment. Combinations of individuals have similar rights, but the liability to injury from the concerted action of numbers has placed upon their freedom to quit work these additional qualifications: That their action must be taken for their own interest, and not for the primary purpose of injuring another or others, and neither in end sought, nor in means adopted to secure that end, must it be prohibited by law nor in contravention of public policy." *Cohn & Roth Electric Co. v. Bricklayers', Masons' & Plasterers' Local Union No. 1*, 92 Conn. 161, 101 Atl. 659, 661, 6 A.L.R. 887 (1917).

The opinion in *Alfred W. Booth & Bro. v. Burgess*, 72 N.J. Eq. 181, 65 Atl. 226 (1906) constitutes almost a *reductio ad absurdum* of the theory that conduct which is lawful when pursued by one person cannot be unlawful when pursued by many in combination. The court was convinced that coercion of a neutral was unfair as to the employer but under the theory it was forced to uphold, without regard to motive, strikes and threats thereof against a neutral. However, the court then proceeded to find that it was unlawful for a union agent to notify union men of a rule which required them to quit work under the circumstances on the ground that such notification constituted coercion of the union men.

14. Cf. Sayre, *Criminal Conspiracy* (1922) 35 Harv. L. Rev. 393, 410, 411.

and society indirectly, as a consequence of combined action, it is not surprising that there should be a lack of uniformity in the decisions. At the same time, this lack of uniformity is generally traceable to a difference in emphasis given to one factor over another by the courts which have considered the problem, rather than to a disagreement on legal fundamentals.¹⁵ As far as the offending employer is concerned, the refusal of organized labor to give him its patronage or to purchase his product is a necessary incident of the labor dispute.¹⁶ The difficulty arises when there is a combined withdrawal of patronage from a third person as a consequence of his dealings with the employer.

Here it is necessary to recognize two notions that, although not inconsistent in theory, sometimes draw close to conflict in practice. One is that laborers should be privileged to refrain from doing anything that may be injurious to their cause—that they are entitled to act in self-defense for their own protection. The other is that they should not be permitted by force of combination to injure others outside the immediate dispute in order to compel assistance in the struggle. In short, on the one hand the belief that the conduct of labor is necessary to the protection of the organization prevails over the feeling that it is designed to coerce non-disputants, while on the other its coercive aspect is considered as its motivating factor. Of course the line is often a shadowy one, but the principle, that labor is not to be permitted to inflict injury on a third party to force action detrimental to the employer where its conduct stems from such intention, is generally recognized.¹⁷ With this difference between negative and positive interference with the third party's liberty in mind, one may easily see that to justify a combined withdrawal by labor of general patronage which a retailer would normally enjoy, because the retailer purchases some of his goods for resale from the dis-

15. The principle is concisely stated in the opinion of Beatty, C. J., in *J. F. Parkinson v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027, 1036, 21 L.R.A. (N.S.) 550, 16 Ann. Cas. 1165 (1908): "Any injury to a lawful business, whether the result of a conspiracy or not, is *prima facie* actionable, but may be defended upon the ground that it was merely the result of a lawful effort of the defendants to promote their own welfare."

16. See however, *Hopkins v. Oxley Stave Co.*, 83 Fed. 912 (C.C.A. 8th, 1897). This case is not to be approved. Cf. *Cornellier v. Haverhill Shoe Mfrs. Ass'n*, 221 Mass. 554, 109 N.E. 643, L.R.A. 1916C 218 (1915).

17. There are exceptional cases where this distinction is not taken and action against a neutral which is admitted to be coercive, not merely defensive, is approved. *Empire Theatre v. Cloke*, 53 Mont. 183, 163 Pac. 107, L.R.A. 1917E 383 (1917); See *Truax v. Bisbee Local No. 380 C. & W. A.*, 19 Ariz. 379, 171 Pac. 121 (1918); *Pierce v. Stableman's Union*, Local No. 8760, 156 Cal. 70, 103 Pac. 324 (1909).

putant employer, would be exceedingly more difficult than to justify a combined refusal on the part of labor to purchase any product of the employer's factory. This is so, simply because a refusal by labor to purchase "unfair" goods cannot be labelled as designed to coerce anyone other than the employer. But if labor combines to withhold general patronage from a retailer because he carries in stock "unfair" goods, it is not difficult to believe that labor has more in mind than self-protection, more in mind than merely that patronizing the retailer would be injurious to the cause. This distinction has been frequently applied and is the basis of most cases holding the use of "Unfair" and "We Don't Patronize" lists illegal. In fine, condemnation of the practice rests on the feeling that the general retailer does not make himself a party to the dispute by stocking the manufacturer's product, and is not thus brought within the permissible area of conflict so that injury to his business can be justified by the theory of competition.¹⁸

18. In *Wilson v. Hey*, 232 Ill. 389, 83 N.E. 928, 929, 16 L.R.A. (N.S.) 85 (1908) it is said: "It is not wrong for members of a union to cease patronizing anyone when they regard it for their interest to do so, but they have no right to compel others to break off business relations with the one from whom they have withdrawn their patronage, and to do this by unlawful means, with the motive of injuring such person." And in *People v. McFarlin*, 43 Misc. 591, 89 N.Y. Supp. 527, 529 (1904) the court said: "... I apprehend that in each case, as it arises, a question for the jury is likely to be presented, whether the persons accused were only doing what they had the right to do in bestowing their favor upon their friends, and withholding their business and beneficial intercourse from those whom they believed to be unfriendly, or whether, on the other hand, their immediate object and intent were to injure another in his trade or business. . . ." These courts are talking about the same thing which was expressed by Van Orsdel, J., in *American Federation of Labor v. Buck's Stove and Range Co.*, 33 App. D.C. 83, 32 L.R.A. (N.S.) 748, 768 (1909), as follows: "No one doubts, I think, the right of the members of the American Federation of Labor to refuse to patronize employers whom it regards as unfair to labor. It may procure and keep a list of such employers not only for the use of its members, but as notice to their friends that the employers whose names appear thereon are regarded as unfair to labor. This list may not only be procured and kept available for the members of the association and its friends, but it may be published in a newspaper or series of papers. . . . But as soon as, by threats or coercion, they attempt to prevent others from patronizing a person whose name appears on the list it then becomes an unlawful conspiracy—a boycott."

Compare the majority and dissenting opinions in *Hopkins v. Oxley Stave Co.*, 83 Fed. 912 (C.C.A. 8th, 1897). See also: *Casey v. Cincinnati Typographical Union No. 3*, 45 Fed. 135 (C.C.S.D. Ohio, 1891). *Loewe v. California State Federation of Labor*, 139 Fed. 71 (C.C.N.D. Cal., 1905), *Seattle Brewing and Malt-ling Co. v. Hansen*, 144 Fed. 1011 (C.C.N.D. Cal. 1905), *Rocky Mountain Bell Telephone Co. v. Montana Federation of Labor*, 156 Fed. 809 (1907), and *Auburn Draying Co. v. Wardell*, 165 N.Y. Supp. 469, 124 N.E. 97, 6 A.L.R. 901 (1919), with *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027, 21 L.R.A. (N.S.) 550, 16 Ann. Cas. 1165 (1908), *Pierce v. Stablemen's Union Local No. 8760*, 156 Cal. 70, 103 Pac. 324 (1909), and *Lindsay & Co. v. Montana Federation of Labor*, 37 Mont. 264, 96 Pac. 127, 18 L.R.A. (N.S.) 707, 127 Am. St. Rep. 722 (1908).

A similar problem is presented when picketing at the place of business of a third party is resorted to. As previously stated, there is general agreement that picketing, *per se*, is lawful as a mode of peaceful persuasion.¹⁹ Although in many cases the buying public may be appealed to effectively at the establishment where the dispute is in progress, in the case of a manufacturing plant, picketing at the factory may be utterly fruitless in affecting the sale of the product manufactured. If the goods manufactured are being retailed to the public elsewhere, then as a matter of common sense, to be more effective the attack on such goods should center at the place where the retailing is going on. This may lead the union to establish pickets at the retailer's place of business. If such picketing amounts to no more than an attempt to notify the public of the dispute with the manufacturer and an appeal not to buy his product, it may easily and appropriately be considered as merely designed to enlighten prospective purchasers in the hope that they may see fit to pass up the product. But the objection to this practice is that it may have a coercive effect on the retailer. Here again, however, a distinction is necessary between the incidental and the intentional. Obviously enough, if the picketing is successful, the retailer may be compelled in self-protection to cease stocking the manufacturer's product. However, exactly the same thing would happen if picketing at the manufactory alone should be sufficient. Yet no one would suppose in the latter case that the manufacturer would be entitled to relief merely because the picketing at the factory was successful in stopping retail sales elsewhere. Therefore, those courts that recognize the legality of picketing of this kind at the place where the goods are retailed are taking the proper view of the matter.²⁰

When, however, the picketing at the retailer's place of business goes beyond an effort merely to acquaint the public with the fact that a particular product which is there being sold is unfair, and takes on the color of an effort to dissuade the public from dealing generally with the retailer, the coercive effect is not merely incidental.²¹ Here the union is seeking to compel him to

19. See note 4, *supra*.

20. See *Goldfinger v. Feintuch*, 276 N.Y. 281, 11 N.E. (2d) 910 (1937); *Engelmeyer v. Simon*, 143 Misc. 621, 265 N.Y. Supp. 636 (1933).

21. See for example, *Evening Times Printing & Publishing Co. v. American Newspaper Guild*, 122 N.J. Eq. 545, 195 Atl. 378 (1937), *Mitnick v. Furniture Workers' Union Local No. 66*, C.I.O. of City of Newark, 200 Atl. 553 (N.J. Ch. 1938), and *A. Fink & Son v. Butcher's Union No. 422*, of Newark, 84 N.J. Eq. 638, 95 Atl. 182 (1915), where such practices were resorted to. See also, *Seattle Brewing & Malting Co. v. Hansen*, 144 Fed. 1011 (C.C.N.D. Cal. 1905); *Parker Paint & Wall Paper Co. v. Local Union No. 813*, 87 W. Va. 631, 105

stop dealing with the manufacturer by threatening him with financial ruin if he persists. It is undertaking by compulsion to force the retailer to actually take its side in the conflict. Even liberal courts, such as those of New York, balk at favoring such tactics with their approval.²² The essential kinship between action of this kind and picketing of such a nature as to intimidate prospective customers is readily perceptible. That is, violent picketing deprives prospective customers of the ability to choose freely between buying and not buying, just like the threatened injury to the retailer's business by the general picketing of his establishment is calculated to destroy his free choice.²³ And herein rests the real foundation, such as it is, for those decisions that have found picketing itself—such as in front of a restaurant—unlawful.²⁴ Such courts have been ready to believe that any pick-

S.E. 911, 16 A.L.R. 222 (1921), in the latter of which picketing a store because it contracted with a nonunion master painter to paint the building was enjoined as unfair.

22. *Commercial House and Window Cleaning Co. v. Awerkin*, 138 Misc. 512, 240 N.Y. Supp. 797 (1930); *George F. Stuhmer & Co. v. Kroman*, 241 App. Div. 702, 269 N.Y. Supp. 788 (1934), *aff'd* without opinion 265 N.Y. 481, 193 N.E. 281 (1934); *Grandview Dairy v. O'Leary*, 158 Misc. 791, 285 N.Y. Supp. 841 (Sup. Ct. 1936); *Mlle. Reif, Inc. v. Randau*, 166 Misc. 247, 1 N.Y. Supp. (2d) 515 (Sup. Ct. 1937); *B. Gertz, Inc. v. Randau*, 162 Misc. 786, 295 N.Y. Supp. 871 (Sup. Ct. 1937); *See Goldfinger v. Feintuch*, 276 N.Y. 281, 282, 11 N.E. (2d) 910, 912 (1937): "Likewise it is illegal to picket the place of business of one who is not himself a party to an industrial dispute to persuade the public to withdraw its *patronage generally* from the business for the purpose of causing the owner to take sides in a controversy in which he has no interest." (*Italics supplied.*) Cf. *Nann v. Raimist*, 255 N.Y. 307, 174 N.E. 690, 73 A.L.R. 699 (1931). The distinction between this case and the *Awerkin* case is that the dispute in the latter was not with the owner of the establishment being picketed but was with the employer of the window cleaners over his refusal to hire union men on his contracts, whereas in the *Nann* case the dispute was with the owner of the picketed store. *Contra*: *Hydrox Ice Cream Co. v. Doe*, 293 N.Y. Supp. 1013 (1937); *Manhattan Steam Bakery v. Schindler*, 250 App. Div. 467, 294 N.Y. Supp. 783 (1937); *Davega-City Radio, Inc. v. Randau*, 166 Misc. 246, 1 N.Y. Supp. (2d) 514 (Sup. Ct. 1937).

Obviously, if picketing a store generally because it stocks a nonunion product is unlawful, picketing an establishment because it has erected a nonunion sign would be unlawful. *Canepa v. "John Doe"*, 277 N.Y. 52, 12 N.E. (2d) 790 (1938); *Weil & Co. v. Doe*, 5 N.Y.S. (2d) 559 (Sup. Ct. 1938). *Contra*: *American Gas Stations Inc. v. Doe*, 250 App. Div. 227, 293 N.Y. Supp. 1019 (Sup. Ct. 1937). Nor would the fact that the placard stated only that the sign was unfair—not the store—make any difference because merely announcing the sign as unfair, it not being for sale, could have no other purpose than to injure the store owner.

23. For a very good statement of this view see *Remington Rand, Inc. v. Crofoot*, 248 App. Div. 356, 289 N.Y. Supp. 1025 (1936), *aff'd* by memorandum opinion, 18 N.E. (2d) 37 (Ct. App. 1938).

24. *Local Union No. 313, Hotel and Restaurant Employees' International Alliance v. Stathakis*, 135 Ark. 86, 205 S.W. 450, 6 A.L.R. 894, (1918); *Moore v. Cooks' Waiters' & Waitresses' Union No. 402*, 39 Cal. App. 538, 179 Pac. 417 (1919); *Robison v. Hotel & Restaurant Employee's Local No. 782*, 35 Idaho 418, 207 Pac. 132, 27 A.L.R. 642 (1922); *Webb v. Cooks', Waiters' and Waitresses' Unions No. 748*, 205 S.W. 465 (Tex. Civ. App. 1918); *St. Germain v.*

eting destroys the possibility of the customer's deciding for himself which side he will favor.²⁵ However, courts that give substance and weight to the belief that a prospective customer might be unable to stand the publicity which might attend patronizing a place being picketed are overlooking the fact that this kind of coercion, if existent, is merely a necessary incident of any effort to acquaint the public, by picketing—which is perhaps the only available means—of the labor controversy. And when weighed against the interests of the union the possible or obvious coercive effect of picketing without suggestion of violence or retaliation should not be allowed to control.

This is also believed to be the underlying consideration that fathered the "unity of interest" idea found in a leading and recent New York case which involved picketing at a retailer's place of business.²⁶ This case, however, is not the first where this theory has found expression. It had previously been employed to justify striking against an establishment other than the one involved in the dispute because the offender was having some of his work done at the establishment in question.²⁷ The New York court undoubtedly had in mind the coercive effect on the retailer of such

Bakery and Conf. Workers' Union No. 9 of Seattle, 97 Wash. 282, 166 Pac. 665, L.R.A. 1917F 824 (1917). See also, *Rosenberg v. Retail Clerks' Ass'n Local 428*, 39 Cal. App. 67, 177 Pac. 864 (1918); *Ellis v. Journeyman Barbers' International Union of America, Local No. 52*, 194 Iowa 1179, 191 N.W. 111, 32 A.L.R. 756 (1922); *Elkind & Sons v. Retail Clerks International Protective Ass'n*, 114 N.J. Ch. 586, 169 Atl. 494 (1933); *Bomes v. Providence Local No. 223 of Motion Picture Mach. Operators of U. S. and Canada*, 51 R.I. 499, 155 Atl. 581 (1931). But cf. *Bayonne Textile Corp. v. American Federation of Silk Workers*, 116 N.J. Eq. 146, 172 Atl. 551, 92 A.L.R. 1450 (1934); *Perfect Laundry Co. v. Marsh*, 120 N.J. Eq. 508, 186 Atl. 470 (1936); *Kirmse v. Adler*, 311 Pa. 78, 166 Atl. 566 (1933).

25. This statement is applicable also to picketing designed to interfere with the flow of labor. But some courts seem to make a distinction between the two types which is of doubtful validity. Compare *Cooks', Waiters' and Waitresses' Local Union v. Papageorge*, 230 S.W. 1086 (Tex. Civ. App. 1921), with *International Ladies' Garment Worker's Local Union No. 123 v. Dorothy Frocks*, 95 S.W. (2d) 1346 (Tex. Civ. App. 1936), and *International Ass'n of Machinists Union, Local No. 1488 v. Federated Ass'n of Accessory Workers*, 109 S.W. (2d) 301 (Tex. Civ. App. 1937). See also, *Robison v. Hotel Restaurant Employees Local No. 782*, 35 Idaho 418, 207 Pac. 132 (1922).

26. *Goldfinger v. Feintuch*, 276 N.Y. 281, 11 N.E. (2d) 910 (1937). The act considered in the opinion may have had some bearing on this theory.

27. *Iron Moulders' Union v. Allis-Chalmers Co.* No. 125, 166 Fed. 45, 20 L.R.A. (N.S.) 315 (C.C.A. 7th, 1908); *Searle Mfg. Co. v. Terry*, 56 Misc. 265, 106 N.Y. Supp. 438 (Sup. Ct. 1905). See also, *Gill Engraving Co. v. Doerr*, 214 Fed. 111 (D.C.S.D.N.Y. 1914). But see, *Vonnegut Machinery Co. v. Toledo Machine and Tool Co.*, 263 Fed. 192 (D.C.N.D. Ohio 1920), reversed for lack of jurisdiction, 274 Fed. 66 (1921); *Schlang v. Ladies' Waist Makers Union, Local 25*, 67 Misc. 221, 124 N.Y. Supp. 289 (Sup. Ct. 1910); *Pacific Typesetting Co. v. International Typographical Union*, 125 Wash. 273, 216 Pac. 358, 32 A.L.R. 767 (1923).

picketing and, in order to justify the union's conduct notwithstanding, it emphasized the connection or relationship between manufacturer and retailer. The court's realism in recognizing the possibility of coercion is hardly open to question, but admitting its propriety by means of the suggested theory is of doubtful advisability. The principle applied seems to be that coercion directed at others than the immediate employer may be permissible in some cases, the test to consist of a finding of "unity of interest." If there is validity to this concept, however, it should justify direct coercion of the retailer, not only coercion which may be a necessary incident of a direct attack on the goods of the manufacturer at the point of absorption by the public. Yet the court was clear enough in indicating that it would not approve direct coercion.²⁸ This being so, the sounder view would be to justify such picketing as merely a necessary attempt to center the attack on the employer's goods at the point where it would have the greatest effect on the buying public.²⁹

Interference with the Third Party's Employment Relations

When the "buying public" happens to be other industrialists who utilize the manufactured product in their trades, the method usually resorted to for the purpose of destroying the employer's market has as its prime factor the provoking of labor troubles. The problems which result from activity of this kind are counterparts of those just considered. The difficulty always comes in trying to separate conduct which, in the light of the existing dispute, may be considered as reasonably necessary for the protection of the policy initiated against the offending employer, from that which goes beyond cooperation and amounts to the attempted

28. "We do not hold more than that, where a retailer is in unity of interest with the manufacturer, the union may follow the nonunion goods and seek by peaceful picketing to persuade the consuming public *to refrain from purchasing the nonunion product*, whether that is at the plant of the manufacturer or at the store of the retailer in the same line of business and in unity of interest with the manufacturer." *Goldfinger v. Feintuch*, 276 N.Y. 281, 11 N.E. (2d) 910, 913 (1937). (Italics supplied.)

29. The concurring opinion of Judge Lehman, with which Judge Loughran was in accord, seems the sounder: "I agree that peaceful picketing of the plaintiff's place of business by the defendant union for the purpose of inducing the plaintiff's customers to refrain from buying nonunion products of a manufacturer, which are on sale by the plaintiff, is lawful. That is not a 'secondary boycott'. . . . I agree, too, that the union would be acting unlawfully if it picketed the plaintiff's place of business in manner calculated to impede or intimidate customers of the plaintiff, or if the union attempted to coerce the plaintiff, by other unlawful acts or by threat of injury to his business, *except as such injury might result by the use, by the union, of lawful means to achieve a lawful end.*" *Goldfinger v. Feintuch*, 276 N.Y. 281, 11 N.E. (2d) 910, 914-915 (1937). (Italics supplied.)

coercion of third parties. No progress is made by thinking in terms of "sympathetic strikes."

Coercion in cases of this kind may occur, at least theoretically, in two ways. For example, as a consequence of a dispute between members of a teamsters' union and an employer using nonunion teamsters, union men on a construction job may refuse to handle material hauled thereto by the nonunion teamsters. The only way that any element of coercion directed at a third party can be found in this situation is to assume either that the members of the construction crafts are coerced into refusing to handle the materials, or that the conduct of these crafts is coercive of those who seek to make use of the materials.

The matter of coercion of its own members by the union has, perhaps strangely, been used more than once to support the issuance of an injunction to restrain a walk-out of the employees of a neutral. Although frequently there may be realism in finding that contented employees have been compelled by the rules of their union to leave their jobs and thus to aid in a dispute in which they have scant personal interest, if any,³⁰ nevertheless the realities of such a situation should hardly be allowed to control. Sometimes, also, individuals may be virtually forced to become union men to avoid consequences that would be undesirable if not unbearable, yet this is not a matter of direct concern to courts considering, with regard to third persons, the operation of a union rule on its members. A sufficient answer to coercion of union members seems to lie in the fact that the organization of trade unions has been given legal approval. And, as has been pointed out in a well considered opinion,³¹ if unions are permitted to organize, that such permission carries with it the power to adopt rules for the control of the organization and its members necessarily follows. To say that the union should have an unabridged privilege to adopt rules and enforce them without regard to the circumstances which may justify their adoption would not be wise.³² But if the members of a union are recognized as enjoying

30. *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn. of North America*, 274 U.S. 37, 47 S.Ct. 522, 71 L.Ed. 916 (1937); *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 114 S.W. 997, 22 L.R.A. (N.S.) 607, 128 Am. St. Rep. 492 (1908); *Barr v. Essex Trades Council*, 53 N.J. Eq. 101, 30 Atl. 881 (1894); *Alfred W. Booth & Bro. v. Burgess*, 72 N.J. Eq. 181, 65 Atl. 226 (1906); *Purvis v. Local No. 500 U. B. of Carpenters and Joiners*, 214 Pa. 348, 63 Atl. 585 (1906).

31. *Bossert v. United Brotherhood of Carpenters and Joiners of America*, 77 Misc. 592, 137 N.Y. Supp. 321 (1912).

32. *Barker Painting Co. v. Brotherhood of Painters, Decorators and Paperhangers of America*, 15 F. (2d) 16 (C.C.A. 3rd, 1926); *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803 (C.C.S.D. Ohio 1894); *Bossert v. Dhuy*, 221

the privilege, acting in combination, to refrain from conduct that will be a blow to the very organization itself,³³ the fact that in a given case their actions result from the force of legitimate union rules should not justify a finding of unlawful coercion by the union representatives charged with their enforcement.³⁴ The justification for organization itself is at stake in such a case. The suggestion that a third party may become so intimately associated with the disputant employer as to justify measures which operate coercively as to him is obviously applicable to the situation between a union and its members, if resort to any such theory is necessary.

Concerning coercion of the user by the operation of such rules, a sharp distinction must be made between conduct which is primarily self-protective and that which is designed to coerce. Obviously, if the members of one craft by handling or working with or upon an article manufactured by, or destined for, an unfair employer make it possible for him to carry on his business and successfully resist the demands of the union, they are thus helping to break the backs of their fellows and to destroy unionism itself. If the law denies to them freedom of action and by the use of legal process compels them to handle the product in question, it is thus doing for the disputant employer what it generally

N.Y. 342, 117 N.E. 582, Ann. Cas. 1918D 661 (1917); *Falciglia v. Gallagher*, 164 Misc. 838, 299 N.Y.S. 890 (Sup. Ct. 1937); *O'Keefe v. Local 463 of United Ass'n of Plumbers and Gasfitters of U. S. and Canada*, 277 N.Y. 300, 14 N.E. (2d) 77 (1938).

33. *Alfred W. Booth and Bro. v. Burgess*, 72 N.J. Eq. 181, 65 Atl. 226 (1906).

34. "The decisions are practically in harmony in holding that it is within the power of the labor unions, and it is lawful for them, to instruct or order their members not to accept employment with an individual, or to continue in such person's employment, where the action of a union is justifiable in the sense that it is to promote the welfare of the members of the union." *Seymour Ruff & Sons v. Bricklayers', Masons' and Plasterers' International Union of America*, 163 Md. 687, 164 Atl. 752, 757 (1933). See also, *Paine Lbr. Co. v. Neal*, 244 U.S. 459, 37 S.Ct. 718, 61 L.Ed. 1256 (1917); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n of North America*, 274 U.S. 37, 47 S.Ct. 522, 71 L.Ed. 916 (1927); *Gill Engraving Co. v. Doerr*, 214 Fed. 111 (D.C. S.D.N.Y. 1914); *Meier v. Speer*, 96 Ark. 618, 132 S.W. 988, 32 L.R.A. (N.S.) 792 (1910); *J. F. Parkinson v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027, 21 L.R.A. (N.S.) 550 (1908); *Cohn & Roth Electric Co. v. Bricklayers', Masons' and Plasterers' Local Union No. 1*, 92 Conn. 161, 101 Atl. 659 (1917); *McCarter v. Baltimore Chamber of Commerce*, 126 Md. 131, 94 Atl. 541 (1915); *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 77 N.W. 13 (1898); *Gray v. Building Trades Council*, 91 Minn. 171, 97 N.W. 663, 63 L.R.A. 753 (1903); *Bossert v. Dhuy*, 221 N.Y. 342, 117 N.E. 582, Ann. Cas. 1918D 661 (1917); *W. F. Const. Corp. v. Hanson*, 250 App. Div. 727, 293 N.Y. Supp. 170 (1937); *Rhodes Bros. Co. v. Musicians' Union*, 37 R.I. 281, 92 Atl. 641, L.R.A. 1915E 1037 (1915). Compare *Reynolds v. Davis*, 198 Mass. 294, 84 N.E. 457, 17 L.R.A. (N.S.) 162 (1908); *Alfred W. Booth and Bro. v. Burgess*, 72 N.J. Eq. 181, 65 Atl. 226 (1906).

will not permit a union to do for itself, that is, to force another to join in the fight against his will.

At the same time, self-protection is one thing, coercion of third parties another. Perhaps there is more than a theoretical difference between a refusal by union members to handle non-union material, and a blanket notification to members of the building trades that they will have "labor troubles" if they use products of a certain manufacturer.⁸⁵ According to one view, if union men are privileged to refuse to handle nonunion materials, they should not be denied the privilege of notifying their employers of such an intention. Indeed, this procedure is certainly fairer to everyone concerned. But to notify the one for whom they are working as well as other interested parties that "labor troubles" will follow under certain circumstances may well mean more than the facts justify. Such notification has the color of a direct attempt to control the conduct of these parties, with a possible suggestion of the militant, rather than a mere thoughtful endeavor to notify them of the policy of the union. In reality, the effect generally may be the same in both cases, but sometimes an actual difference is perceptible. Thus a refusal of union labor to work on a union job for a subcontractor because the principal contractor has another job where nonunion men are employed seems primarily coercive.⁸⁶ In the same category fall cases where there is a refusal to handle supplies sold by a manufacturer because he has furnished other supplies to one who has been declared unfair,⁸⁷ or where a union threatens to withdraw from a job—not merely to refuse to handle nonunion material—if the employer continues to purchase nonunion goods,⁸⁸ or the goods of

85. See however, *Bossert v. Dhuy*, 221 N.Y. 342, 117 N.E. 582, Ann. Cas. 1918D 661 (1917), where the court said that the use of this expression simply meant that if nonunion made materials are used the members of the Brotherhood will refuse to install the same.

86. *Bricklayers', Masons' and Plasterers' International Union of America v. Seymour Ruff & Sons*, 160 Md. 483, 154 Atl. 52 (1931); cf. *Seymour Ruff & Sons Inc. v. Bricklayers', Masons' and Plasterers' International Union of America*, 163 Md. 687, 164 Atl. 752 (1933); see *Cohn & Roth Electric Co. v. Bricklayers', Masons' and Plasterers' Local Union No. 1*, 92 Conn. 161, 101 Atl. 659 (1917); *Pickett v. Walsh*, 192 Mass. 572, 78 N.E. 753, 6 L.R.A. (N.S.) 1067 (1906).

87. *Temperton v. Russell* [1893] 1 Q. B. 715.

88. *Irving v. Joint District Council of New York and Vicinity of United Brotherhood of Carpenters*, 180 Fed. 896 (C.C.S.D.N.Y. 1910); *Anderson & Lind Manufacturing Co. v. Carpenter's District Council*, 308 Ill. 488, 139 N.E. 887 (1923) (unsatisfactory because end considered unlawful); *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 114 S.W. 997, 22 L.R.A. (N.S.) 607, 128 Am. St. Rep. 492 (1908); cf. *Quinn v. Leathem* [1901] A.C. 495; see also, *Decorative Stone Co. v. Building Trades Council*, 18 F. (2d) 333 (S.D.N.Y. 1927) (under

one who also sells to a nonunion employer.³⁹ Although not always clearly stated or perhaps recognized, the split in cases of this kind must rest on the question whether the conduct of the union or its members is reasonably necessary for the protection or advancement of union interests so that its coercive effect may be treated as incidental, or whether these elements would be so remote without coercion that the latter must be considered the primary desire and intention.⁴⁰ With this in mind the tendency should be in favor of recognizing a privilege in labor to refrain from advancing the cause of those forces inimical to the best interests of the group and to promote the cause of unionism by refusing to handle or work with or upon materials manufactured by nonunion labor,⁴¹ by refusing to work for a subcontractor on a

the Sherman Act) aff'd 23 F. (2d) 426 (1928), cert. denied, 277 U.S. 594, 48 S.Ct. 530, 72 L.Ed. 1005 (1928).

39. *Burnham v. Dowd*, 217 Mass. 351, 104 N.E. 841, 51 L.R.A. (N.S.) 778 (1914).

40. *Cf. Bricklayers', Masons' and Plasterers' International Union of America v. Seymour Ruff & Sons, Inc.*, 160 Md. 483, 154 Atl. 52 (1931), with *Seymour Ruff & Sons, Inc. v. Bricklayers', Masons' and Plasterers' International Union of America*, 163 Md. 687, 164 Atl. 752 (1933). See also, *Bossert v. United Brotherhood of Carpenters and Joiners of America*, 77 Misc. 592, 137 N.Y. Supp. 321 (1912), where this distinction is very clearly stated.

41. *Gray v. Building Trades Council*, 91 Minn. 171, 97 N.W. 663, 63 L.R.A. 753, 103 Am. St. Rep. 477 (1903); *George J. Grant Construction Co. v. St. Paul Building Trades Council*, 136 Minn. 167, 161 N.W. 520 (1917); *Alfred W. Booth & Bro. v. Burgess*, 72 N.J. Eq. 181, 65 Atl. 226 (1906) (ground of decision questionable); *Bossert v. Dhuy*, 221 N.Y. 342, 117 N.E. 582, Ann. Cas. 1918D 661 (1917); *State v. Van Pelt*, 136 N.C. 633, 49 S.E. 177 (1904). *Contra: Shine v. Fox Bros. Mfg. Co.*, 156 Fed. 357 (C.C.A. 8th, 1907); *Purvis v. Local No. 500, United Brotherhood of Carpenters and Joiners*, 214 Pa. 348, 63 Atl. 585 (1906); *Albro J. Newton Co. v. Erickson*, 70 Misc. 291, 126 N.Y. Supp. 949 (1911); see *Anderson & Lind Mfg. Co. v. Carpenters' District Council*, 308 Ill. 488, 139 N.E. 887 (1923); *cf. A. T. Stearns Lbr. Co. v. Howlett*, 260 Mass. 45, 157 N.E. 82 (1927); *Armstrong Cork & Insulation Co. v. Walsh*, 276 Mass. 263, 177 N.E. 2 (1931); *Service Wood Heel Co. v. Mackesy*, 199 N.E. 400 (Mass. 1936).

Auburn Draying Co. v. Wardell, 227 N.Y. 1, 124 N.E. 97 (1919), and *Willson & Adams Co. v. Pearce*, 135 Misc. 426, 237 N.Y. Supp. 601 (1929), reversed, 265 N.Y. Supp. 624 (Sup. Ct. App. Div. 1933), aff'd without opinion, 264 N.Y. 521, 191 N.E. 545 (1934), should be compared with the *Bossert* case. In the latter the court was very specific in pointing out that there was involved no more than a refusal of members of the United Brotherhood of Carpenters and Joiners to install or handle nonunion made materials in order to protect their position as workingmen. In the *Auburn* case it was found that members of the Central Labor Union threatened to strike and did strike against the customers of the plaintiff, and threatened to withdraw and did withdraw patronage from them because of their business dealings with the plaintiff, in short, that they purposed to bring loss and injury to such customers unless the latter discontinued all dealings with the plaintiff. Such findings definitely show that the court was objecting to that practice generally known as the "secondary boycott," i.e., intentional coercion of disinterested third persons, a practice vastly different from refusing to aid the enemy by handling his products, which the *Bossert* case involved. Furthermore, the court in the *Auburn* case indicated very definitely that it considered the end un-

job where the principal contractor is nonunion,⁴² by refusing to work on the same job with nonunion men,⁴³ or by refusing to handle work for customers of their employers who are in dispute with union labor.⁴⁴ The tendency to scrutinize carefully the relationship between the various crafts that may combine in action of this sort springs from a feeling that there are reasonable limits to the necessity for such a program, and that when these limits are passed the coercive design becomes plainly visible. Further-

lawful. The case might be compared with *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011, 51 L.R.A. 339, 79 Am. St. Rep. 330 (1900), in this respect. The *Willson & Adams* case, however, is by no means as easy to explain. There were a number of plaintiffs, all using nonunion teamsters. The defendants included the Building Trades Council consisting of all trades. It was found that members of the building trades council were frequently called from jobs because nonunion teamsters were used in the hauling of materials to the jobs although such members were not called upon to handle such materials, and that they were called off one job simply because materials were hauled to other jobs of the same contractor by nonunion teamsters. Apparently in all cases the materials were union made. The lower court took the view that the end, which it found to be to compel the nonunion teamsters in the employ of the plaintiffs to join the union, was unlawful. The Appellate Division reversed, saying very briefly, that the end and means were lawful. It disposed of the *Wardell* case in a sentence, suggesting that the union conduct there was "inconsistent with the public interests, or hurtful to the public order, or detrimental to the public good," an amazing way to handle a question of such moment to employers and employees alike. Very difficult is it to believe that self-protection required the kind of conduct as that found by the court. Intentional coercion of third parties was manifest. The only reasonable distinction between this case and the *Wardell* case is that the former involved merely a refusal of union men to work on a job where materials hauled by nonunion teamsters were used, and a refusal to work for a contractor who on any job, whether the one where the strike occurred or not, undertook to use materials delivered by nonunion teamsters, that such conduct was required in order to protect their positions as workingmen, and that any resulting coercion was incidental. Such a position would seem tenuous indeed. It is particularly unfortunate that the Court of Appeals did not take the opportunity to express itself more definitely on the problem.

42. *Meier v. Speer*, 96 Ark. 618, 132 S. W. 988, 32 L.R.A. (N.S.) 792 (1910); *Seymour Ruff & Sons v. Bricklayers', Masons' and Plasterers' International Union of America*, 163 Md. 687, 164 Atl. 752 (1933); but see, *Bricklayers', Masons' and Plasterers' International Union of America v. Seymour, Ruff & Sons*, 160 Md. 483, 154 Atl. 52 (1931).

43. *Gray v. Building Trades Council*, 91 Minn. 171, 97 N.W. 663, 63 L.R.A. 753, 103 Am. St. Rep. 477 (1903); *Meier v. Speer*, 96 Ark. 618, 132 S.W. 988, 32 L.R.A. (N.S.) 792 (1910); *National Protective Association of Steam Fitters and Helpers v. Cummins*, 170 N.Y. 315, 63 N.E. 369, 53 L.R.A. 135, 88 Am. St. Rep. 648 (1902); *Aeolian Co. v. Fischer*, 35 F. (2d) 34 (S.D.N.Y. 1929), reversed, 40 F. (2d) 189 (C.C.A. 2nd, 1930). But see *Blandford v. Duthie*, 128 Atl. 138 (Ct. App. Md. 1925) (probably overruled by *Seymour Ruff & Sons v. Bricklayers', Masons' and Plasterers' International Union of America*, 163 Md. 687, 164 Atl. 752 (1933)); cf. *New England Cement Gun Co. v. McGivern*, 218 Mass. 198, 105 N.E. 885 (1914).

44. *Gill Engraving Co. v. Doerr*, 214 Fed. 111 (D.C.S.D. N.Y. 1914); *Iron Moulders Union No. 125 v. Allis-Chalmers Co.*, 166 Fed. 45, 20 L.R.A. (N.S.) 315 (C.C.A. 7th, 1908); cf. *Carlson v. Carpenter Contractors' Assn.*, 305 Ill. 331, 137 N.E. 222, 27 A.L.R. 625 (1922).

more, where widespread activity occurs the public interest is felt more keenly.⁴⁵

The courts sometimes lay emphasis on the existence of a threat to withhold services or to strike against materials. This judicial practice has provoked criticism on the theory that what an individual is legally privileged to do he is likewise legally privileged to threaten to do.⁴⁶ But this matter is not quite as simple as it sounds. To approach a business man with the announced intention of striking against him because of his dealings with another smacks strongly of an effort to compel him to do one's bidding—action of a darker shade than merely supporting the organization by refusing to be of assistance to the enemy. On the one hand, there is action directed at accomplishing a specific object; on the other, there is no stated direction. There is a suggestion in the first case that the primary effort and intention are to compel assistance in one's fight with another, conduct that amounts to more than merely refraining from doing that which may be detrimental to one's own interests. The difference here is between the punitive and the defensive, between negative or affirmative coercion of neutrals.⁴⁷ If conduct of this kind is mere-

45. See *Auburn Draying Co. v. Wardell*, 227 N.Y. 1, 124 N.E. 97, 6 A.L.R. 901 (1919); *Aeolian Co. v. Fischer*, 27 F. (2d) 560 (D.C.S.D. N.Y. 1928), 35 F. (2d) 34 (1929), reversed on authority of Sherman Act, 40 F. (2d) 189 (C.C.A. 2d, 1930). In the *Aeolian* case the District Judge said: "How far the members of a craft may go in their organized capacity in refusing to work in the same building with nonunion members of other crafts is a question not so simple of solution. It depends upon the extent to which those who co-operate have in point of fact a common interest, and are justified in what they do by honest motives to advance self-interest, as opposed to malicious intent to injure the business or good will of another." 27 F. (2d) at 564.

46. See the arguments against the practice in *Hellerstein, Secondary Boycotts in Labor Disputes* (1937) 47 *Yale L.J.* 341, 358. Compare the dissenting opinion of Justice Holmes in *Vegelahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077, 1079 (1896). See also, *Iron Moulders Union No. 125 v. Allis-Chalmers Co.*, 166 Fed. 45, 20 L.R.A. (N.S.) 315 (C.C.A. 7th, 1908); *Cohn & Roth Electric Co. v. Bricklayers', Masons' and Plasterers' Local Union No. 1*, 92 Conn. 161, 101 Atl. 659, 6 A.L.R. 887 (1917); *Empire Theatre v. Cloke*, 53 Mont. 183, 163 Pac. 107, L.R.A. 1917E 383 (1917); *Rocky Mountain Bell Tel. Co. v. Montana Fed. of Labor*, 156 Fed. 809 (C.C. Mont. 1907); *Irving v. Joint District Council of New York and Vicinity of United Brotherhood of Carpenters*, 180 Fed. 896 (C.C.S.D. N.Y. 1910); *Wilson v. Hey*, 232 Ill. 389, 83 N.E. 928, 16 L.R.A. (N.S.) 85, 22 Am. St. Rep. 119, 13 Ann. Cas. 82 (1908); *Burnham v. Dowd*, 217 Mass. 351, 104 N.E. 841, 51 L.R.A. (N.S.) 778 (1914); *New England Cement Gun Co. v. McGivern*, 218 Mass. 198, 105 N.E. 885 (1914); *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 114 S.W. 997, 22 L.R.A. (N.S.) 607, 128 Am. St. Rep. 492 (1908).

47. "Whether such a notification would in any case amount to a threat or intimidation must be determined from all the facts and circumstances of each particular case. Such notice might have special significance in a particular case, and have no meaning in another." *Gray v. Building Trades Council*, 91 Minn. 171, 97 N.W. 663, 668, 63 L.R.A. 753, 103 Am. St. Rep. 447 (1903). See also, *Thomas v. Cinn. N. O. & T. P. Ry. Co.*, 62 Fed. 803 (C.C.S.D. Ohio 1894).

ly protective support of the organization, the fact that it may interfere with the neutral's exercise of a free will is inconsequential because incidental. But the case is different when the incident becomes the primary and undisguised endeavor.

If we grant that only notification of an intention to do an unlawful act can properly be considered as a threat within the law, our problem is not necessarily solved. As has previously been shown, where there is lacking a sufficient interest to serve as legal justification, it is generally considered unlawful for a combination to engage in a general suspension of business contacts for the purpose of coercing an individual to accept the dictates of the group. And the difference between warning before acting and acting without warning may characterize conduct as punitive or intimidating where otherwise it would go as protective. Those courts that repeat the formula that what one is privileged to do one may threaten, are usually confronted with situations where labor's efforts to bring its policies to the attention of those who might be affected by them do not appear to spring from a punitive design.⁴⁸ Sometimes it is very difficult to determine whether labor is merely following a policy designed as defensive, or is seeking to compel a neutral to act in its favor. This difficulty, however, is perhaps not too great to require condonation of the program in every case. In solving this problem a showing that the plan is a part of settled and general union policy as contradistinguished from a determination to cover the specific case, should be given weight. But, of course, coercion of neutrals may be a part of such policy, and who can say whether a particular union rule was adopted as a necessary defensive measure apart from the desire to force neutrals to sever their contacts with the employer?⁴⁹ The only safe guide must be the demonstrated necessities of each case. Therefore, in the last analysis the problem for the courts is to determine just how far it is necessary for labor to implicate neutrals in its struggle in order adequately to advance or protect its legitimate interests.⁵⁰ If there should come a settled feeling that action

48. The distinction suggested here will clearly appear by a comparison of the prevailing opinion with the dissenting opinion of Shaw, J., in *J. F. Parkinson Co. v. Building Trades Council of Santa Clara County*, 154 Cal. 581, 98 Pac. 1027 (1908). See also, *State v. Van Felt*, 136 N.C. 633, 49 S.E. 177, 68 L.R.A. 760 (1904).

49. See the concurring opinion of Sloss, J. in *J. F. Parkinson Co. v. Building Trades Council of Santa Clara County*, 154 Cal. 581, 98 Pac. at 1037 (1908).

50. See *Aeolian Co. v. Fischer*, 35 F. (2d) 34 (D.C.S.D. N.Y. 1929), reversed on authority of Sherman Act, 40 F. (2d) 189 (C.C.A. 2nd, 1930). The sociological aspects are considered in Notes: (1917) 31 Harv. L. Rev. 482; (1920) 34 Harv. L. Rev. 880; (1920) 30 Yale L. J. 280.

against a neutral is necessary to the adequate protection of these interests, the coercive aspect of such conduct would be entitled to no weight, just as the coercive aspect of a strike against an employer is now considered immaterial in the light of a broader vision concerning labor's privilege to engage in economic conflict with employers.⁵¹

51. A reasonable distinction between the doctrines of *Plant v. Wood*, 176 Mass. 492, 57 N.E. 1011, 51 L.R.A. 339, 49 Am. St. Rep. 330 (1900), and *Pickett v. Walsh*, 192 Mass. 572, 78 N.E. 753, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638 (1906), can be seen by viewing these cases from the standpoint of the secondary boycott. In both the plaintiff's were employees, not employers, and the defendants were union men. In both the claim was that the defendants were acting unlawfully with respect to the plaintiffs in undertaking to secure their discharge because they were nonunion men. In the first case the court found that the sole effort on the part of the defendants was to force the plaintiffs to become members of the union and that they had threatened to strike against the employer in order to compel him to force the plaintiffs to join the union by threatening in turn to discharge them if they refused. This was found unlawful. In the second case the court found that the defendants were trying to get all of the employer's work for themselves, which purpose was lawful notwithstanding that the discharge of the plaintiff's nonunion men might result. Unfortunately, the result of *Plant v. Woods* has been the adoption by the Massachusetts courts of the view that a strike to secure a closed shop is illegal. This view was not required by the decision in that case because striking to secure a closed shop may very likely mean striking to secure all of the work in the shop for union men, rather than striking to compel outsiders to join the union, and the fact that membership in the union would be open to nonunion men should not militate against such a result. *Shinsky v. O'Neil*, 232 Mass. 99, 121 N.E. 790 (1919). In fact, in the *Plant* case the plaintiffs were the victims of that practice usually called a secondary boycott. The real end was to compel the plaintiffs to join the union. With respect to this end the employer was a third party yet the defendants were threatening to damage him by a strike in order to compel him to act against the plaintiffs. In the *Pickett* case the end was getting all the work for union men, something the employer could give them, and the union men were trying to force him to do so by means of a strike. If nonunion men were injured in this effort such injury was incidental, not intentional.

Later Massachusetts cases involving more directly the problem considered in this paper do not demonstrate a close analysis of the question. While *Burnham v. Dowd*, 217 Mass. 351, 104 N.E. 841, 51 L.R.A. (N.S.) 778 (1914) and *New England Cement Gun Co. v. McGivern*, 218 Mass. 198, 105 N.E. 885 (1914) seem sound, *A. T. Stearns Lumber Co. v. Howlett*, 260 Mass. 45, 157 N.E. 82, 52 A.L.R. 1125 (1927), *Armstrong Cork & Insulation Co. v. Walsh*, 276 Mass. 263, 177 N.E. 2 (1931) and *Service Wood Heel Co. v. Mackesy*, 199 N.E., 400 (Mass. 1936) are questionable.

The problem in *Plant v. Woods* was recently before the Supreme Court of the United States in *Lauf v. E. G. Shinner & Co.*, 58 S.Ct. 578 (1938). In an effort to compel the employer to force his employees against their wishes to join the defendant union, on pain of their discharge, picketing the employer's meat markets was resorted to. None of the employees were members of the union and none were on strike. Contrary to the District Court and the Circuit Court of Appeals (82 F. (2d) 68 (C.C.A. 7th, 1936), 90 F. (2d) 250 (C.C.A. 7th, 1937)), the Court found the existence of a "labor dispute" within the Norris-LaGuardia Act (Act of March 23, 1932, c. 90, 47 Stat. 70, [U.S.C. tit. 29 § 101 et seq.] 29 U.S.C.A. § 101 et seq.) and the Wisconsin Act (Wisc. Stat. 1937, § 103.62) modelled on the Federal Act. There was a vigorous dissenting opinion by Mr. Justice Butler in which Mr. Justice McReynolds concurred. Although the Court said that the case being considered was indistinguishable from the earlier case of *Senn v. Tile Layers Protective Union, Local No. 5*,

THE EFFECT OF THE ANTI-TRUST ACTS

Primarily, to turn from a consideration of the common law aspects of combined action by labor against an employer, to the legality of such action under the Anti-Trust Acts,⁵² is to turn from a balancing of competing interests with economic superiority on one side and the weight of concerted action on the other, to a determination of whether the conduct being considered is contrary to the applicable statute. However, this examination also should involve a balancing of interests,⁵³ yet because attention is centered on the encouragement of unrestricted trading and the unwholesomeness of combinations which tend to restrain trade, the relative strength of the opposing factions may not be given its due weight.

The Supreme Court has made fairly clear how cases arising under the Sherman Act and involving coercion of third parties are to be handled. Foremost among its decisions is the *Danbury Hatters* case.⁵⁴ The facts of the conflict there under scrutiny of the Court leave little to debate concerning the presence of injury to free trade.⁵⁵ Indeed, they show that the program followed by

301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229 (1937), the issue there was whether or not peaceful picketing was permissible under the Wisconsin Act where the object was to compel the plaintiff, against his wishes, because of a limiting rule of the union and against his personal interest, to operate his shop as a union shop. That is, the primary purpose of the picketing was not to compel Senn to compel his employees to join the union—thus attempting to destroy the liberty of the employees through coercion of a third person—but to compel Senn to employ union labor. In *Schuster v. International Association of Machinists, Auto Mechanics Lodge No. 701*, 293 Ill. App. 177, 12 N.E. (2d) 50 (1938), a similar practice was approved, while in *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 63 P. (2d) 397 (1936) a contrary view was taken. See also, *Safeway Stores v. Retail Clerks' Union, Local No. 148*, 184 Wash. 322, 51 P. (2d) 372 (1935), and cf. *Union Premier Food Stores, Inc. v. Retail Food C. & M. Union, Local No. 1357*, 98 F. (2d) 821 (C.C.A. 3rd, 1938), and *John F. Trommer, Inc. v. Brotherhood of Brewery Workers of Greater New York*, 167 Misc. 197, 3 N.Y. Supp. (2d) 782 (Sup. Ct. 1938).

52. Only the cases arising under the Sherman Act (Act of July 2, 1890, 26 Stat. 209 (1890), 15 U.S.C.A. § 1 (1929), and the Clayton Act (Act of October 15, 1914, 38 Stat. 738 (1890), 29 U.S.C.A. § 52 (1927)) will be here examined. It is not necessary to consider whether the Sherman Act was designed to apply to labor unions or their conduct. That question has been very completely discussed elsewhere. See Berman, *Labor and the Sherman Act* (1930) 3-54; Witte, *The Government in Labor Disputes* (1932) 61-74; Frankfurter and Greene, *op. cit. supra* note 2, at 8, 139n; Landis, *Book Review* (1931) 44 Harv. L. Rev. 875.

53. See the dissenting opinion of Mr. Justice Brandeis in *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U.S. 37, 56, 47 S.Ct. 522, 71 L.Ed. 916, 54 L.R.A. 791 (1927).

54. *Loewe v. Lawlor*, 208 U.S. 274, 28 S.Ct. 301, 52 L.Ed. 488, 13 Ann. Cas. 815 (1908); and *Lawlor v. Loewe*, 235 U.S. 522, 35 S.Ct. 170, 59 L.Ed. 341 (1915).

55. Wholesalers and retailers in many parts of the country were waited upon by representatives of the union who let them know that further dealings with the manufacturer or his product would result in the power of the

labor did not merely amount to a combined refusal by union men generally to purchase the product of the manufacturer but also involved a determined attempt to compel the manufacturer's vendees, wholesalers and retailers, to act detrimentally to the interests of the employer by threatening them with like injury to their businesses if they did not oblige. In brief, economic pressure on the wholesalers and retailers throughout the country was not a mere necessary incident of labor's attempt to abstain from promoting the interests of the manufacturer by buying its hats, but, on the contrary, was the specific endeavor as manifested by the efforts to destroy the general patronage of such concerns.⁵⁶ This is the program that the court found inherent in the publication and dissemination of the "Unfair" and "We Don't Patronize" lists as shown by the specific acts against middlemen committed by the union representatives.

In the famous *Duplex* case⁵⁷ the Court made very specific its opinion that under the Sherman Act the question at issue did not concern the legality or illegality of the end or the means but was

union being focused upon them, and in some instances their names were added to the "unfair" lists.

56. Nowhere has the distinction here considered received clearer statement than in the concurring opinion of Van Orsdel, J., in the similar case of *American Federation of Labor v. Buck's Stove and Range Co.*, 33 App. D. C. 83, 32 L.R.A. (N.S.) 748 (1909), appeal dismissed as moot, 219 U.S. 581, 31 S. Ct. 472, 55 L.Ed. 345 (1910): "The word 'boycott' is here used as referring to what is usually understood as the 'secondary boycott'; and when used in this opinion, it is intended to be applied exclusively in that sense. . . . From this clear distinction it will be observed that there is no boycott until the members of the organization have passed the point of refusing to patronize the person or corporation themselves, and have entered the field where, by coercion or threats, they prevent others from dealing with such persons or corporation. . . . So long, then, as the American Federation of Labor, and those acting under its advice, refused to patronize complainant, the combination had not arisen to the dignity of an unlawful conspiracy or a boycott. . . . The unlawful conspiracy here consists in the membership of the American Federation of Labor banding together, not to cease dealing with the complainant or purchasing or using its products, but by threats to coerce others not to patronize the complainant, on penalty of the destruction of their business." 32 L.R.A. (N.S.) at 765-766. The language of Robb, J., who wrote the principal opinion in which Van Orsdel, J., concurred shows what Van Orsdel, J., meant by referring to "threats to coerce": "That no physical coercion was practiced in this case does not alter our conclusion, since restraint of the mind, as the evidence in this case clearly demonstrates, is just as potent as a threat of physical violence." 32 L.R.A. (N.S.) at 761. See also, *Gompers v. Buck's Stove and Range Co.*, 221 U.S. 418, 437, 31 S.Ct. 492, 496, 55 L.Ed. 797, 34 L.R.A. (N.S.) 874 (1911) (a contempt proceeding under the injunction issued by the lower court); *Loewe v. California State Federation of Labor*, 139 Fed. 71 (N. D. Cal. 1905); *Sailors' Union of the Pacific v. Hammon Lumber Co.*, 156 Fed. 450 (C.C.A. 9th, 1907).

57. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 41 S.Ct. 172, 65 L.Ed. 349, 16 A.L.R. 196 (1921), noted in (1921) 21 Col. L. Rev. 258; (1921) 19 Mich. L. Rev. 628; (1921) 7 Va. L. Rev. 462.

solely whether or not the conduct of the union was intended to restrain and did restrain commerce among the states.⁵⁸ This position, of course, effectively ruled out of consideration the question that would have been of primary importance under an application of common law principles, namely, whether the program in the light of the common interest between the members of the affiliated unions involved in the contest could be properly viewed as self-defensive rather than coercive. The majority opinion, without a detailed statement of the particular acts complained of, that is, without addressing itself to the problem of whether the conduct involved more than a refusal to handle the complainant's product, ruled that the purpose of the union was to coerce customers of the complainant into withholding their patronage. This was properly characterized, if the finding be accepted, as a secondary boycott, which, in turn, was found to be beyond the protection of the Clayton amendment.⁵⁹ Indeed, in the light of the view entertained by the majority concerning the applicability and scope of the act, the distinction between incidental and intentional coercion of third parties would be unimportant. The dissenters, however, felt that such a distinction was important and undertook to show the community of interest in the dispute with the manufacturer between the trades involved, and that the program amounted to no more than a refusal of the members of such trades to lend their services to the support of the manufacturer's cause and to the destruction of the cause of union labor.⁶⁰

Although in the *Duplex* case the union program was based on the sympathetic assistance of different crafts, and therefore might with some reason have been viewed more as an effort to compel

58. See also, *United Leather Workers International Union v. Herkert & Meisel Trunk Co.*, 265 U.S. 457, 44 S.Ct. 623, 68 L.Ed. 1104, 33 A.L.R. 566 (1924); *Coronado Coal Co. v. United Mine Workers of Am.*, 268 U.S. 295, 45 S.Ct. 551, 69 L.Ed. 963 (1925); *Industrial Ass'n of San Francisco v. U.S.*, 268 U.S. 64, 45 S.Ct. 403, 69 L.Ed. 849 (1925); cf. *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937); *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U.S. 49, 57 S.Ct. 642, 81 L.Ed. 918 (1937); *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 57 S.Ct. 645, 81 L.Ed. 921 (1937); *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 58 S.Ct. 656 (1938); *Apex Hosiery Co. v. Leader*, 90 F. (2d) 155 (C.C.A. 3rd, 1937).

59. See note 52, *supra*.

60. The dissenting opinion was written by Mr. Justice Brandeis, and was concurred in by Mr. Justice Holmes and Mr. Justice Clarke. This opinion should be very carefully compared with the same Justice's dissenting opinion in *Bedford Cut Stone Co. v. Journeymen Stone Cutter's Assn.*, 274 U.S. 37, 63, 47 S.Ct. 522, 71 L.Ed. 916, 54 L.R.A. 791 (1927), where he said, in referring to the union conduct in the *Duplex* case, "It was the institution of a general boycott, not only of the business of the employer, but of the businesses of all who should participate in the marketing, installing or exhibition of its product."

the cooperation of neutrals, only one craft was involved in the case of *Bedford Cut Stone Company v. Journeymen Stone Cutters' Association*⁶¹ which followed six years later. There the Court reiterated its opinion that the sole question was whether the conduct of the union constituted an interference with interstate commerce under the act, and found that the countrywide refusal of the Association's members to work with or on the plaintiff's stone—in keeping with a provision of the constitution of the Association—was a violation of the Sherman Act.⁶² The dissenting opinion of Mr. Justice Brandeis was based on the view that the rule of the Association's constitution and the cooperation between members required thereby, constituted a policy necessary to the protection of the interests of the craft and to avoid self-destruction. This was followed by the position that if from action of this character a restraint of interstate commerce resulted, such restraint could not be classed as "unreasonable" under the settled jurisprudence of the Court.

Whatever may be said of the *Duplex* case concerning the existence of a purpose on the part of the union to directly coerce third parties into discontinuing or withholding their patronage, that such a finding would not have been justified by the facts of the *Bedford* case seems clear. This means, of course, that the latter case did not involve the so-called secondary boycott, and therefore demonstrates that, in fact as well as in statement, the Supreme Court does not consider that the finding of an attempt by labor to compel the assistance of neutrals is necessary to a proper application of the Sherman Act.⁶³

THE EFFECT OF THE ANTI-INJUNCTION ACTS

The Norris-LaGuardia Act⁶⁴ was largely the result of the concern felt by labor over the treatment received by the Clayton Act

61. 274 U.S. 37, 47 S.Ct. 522, 71 L.Ed. 916, 54 L.R.A. 791 (1927), noted in (1927) 40 Harv. L. Rev. 1154; (1927) 26 Mich. L. Rev. 198; (1927) 14 Va. L. Rev. 112; (1927) 37 Yale L. J. 84.

62. See also, *Buyer v. Guilan*, 271 Fed. 65 (C.C.A. 2nd, 1921); *Irving v. Neal*, 209 Fed. 471 (D.C.S.D. N.Y. 1913); *Decorative Stone Co. v. Building Trades Council of Westchester County*, 18 F. (2d) 333 (S.D. N.Y. 1927); 23 F. (2d) 426 (C.C.A. 2nd, 1928); *Aeolian Co. v. Fischer*, 40 F. (2d) 189 (C.C.A. 2nd, 1930); *Paine Lbr. Co. v. Neal*, 244 U.S. 459, 37 S.Ct. 718, 61 L.Ed. 1256 (1917); *A. T. Stearns Lbr. Co. v. Howlett*, 260 Mass. 45, 157 N.E. 82, 52 A.L.R. 1125 (1927).

63. For a collection of cases dealing with similar State Acts, see Note (1923) 27 A.L.R. 656.

64. 47 Stat. 70 (1932), 29 U.S.C.A. §§ 101-115 (1934).

at the hands of the Supreme Court in the *Duplex* case.⁶⁵ Although this act deals with more than the problem presented in the *Duplex* case, the following discussion will be directed solely at its effect on practices designed to coerce third parties into action detrimental to the party with whom a labor dispute exists.⁶⁶ This statute and similar statutes enacted by a number of the states, with the exception of the Wisconsin Act which confers legality on the conduct covered therein, prohibit only the issuance of injunctions in labor disputes.⁶⁷ The result is that, except in Wisconsin, conduct on the part of a labor union or its members which was of such a nature as to permit recovery of damages, prior to enactment of such legislation, is unchanged in this respect. The legislation merely withholds injunctive relief.

From the standpoint of coercion of third parties, the important provisions found in almost the same language in all the acts, prohibit the issuance of any restraining order or injunction "... in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute ... from ... whether singly or in concert ... Ceasing or refusing to perform any work or to remain in any relation of

65. For a discussion of the legislative efforts in this connection and an analysis of the provisions of the legislation which was finally adopted as the Norris-LaGuardia Act, see Frankfurter and Greene, *op. cit.* supra note 2, 205-226. See also, Witte, *The Government in Labor Disputes* (1932).

66. The Norris-LaGuardia Act was held constitutional in *Lauf v. E. G. Shinner & Co.*, 58 S.Ct. 578 (1938). Previously the court had approved the constitutionality of the similar Wisconsin Act in *Senn v. Tile Layers' Protective Association, Local No. 5*, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229 (1937). For general discussion of such legislation, see Feinberg, *Analysis of the New York Law of Secondary Boycott* (1937) 6 Brooklyn L. Rev. 209, 217; Fraenkel, *Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts* (1936) 30 Ill. L. Rev. 854; Witte, *The Federal Anti-Injunction Act* (1932) 16 Minn. L. Rev. 638; Hellerstein, *supra* note 46, at 359; Notes (1936) 5 Fordham L. Rev. 125; (1937) 50 Harv. L. Rev. 1295; (1932) 30 Mich. L. Rev. 1257; (1934) 12 N.Y. U. L. Q. Rev. 101; (1935) 4 Int. Jur. Ass'n Bull. 1; (1936) 5 *id.* at 5, 59; (1937) 5 *id.* at 113; (1937) 6 *id.* at 1; (1938) 6 *id.* at 111.

67. Colo. Stat. Ann. (Michie, 1935) c. 97, § 78; Idaho Laws 1933, p. 215; Ind. Stat. Ann. (Burns, 1933) §§ 501-514; La. Act 203 of 1934; Md. Laws (1935) c. 574; Minn. Stat. (Mason, Supp. 1936) §§ 4260-4267; N.Y. Civil Prac. Act § 876-a; N.D. Laws 1935, c. 247; Ore. Code Ann. (Supp. 1935) §§ 49-1904-1906; Pa. Laws 1937, No. 308; Utah Laws 1933, c. 15; Wash. Laws 1937 Spec. Sess., c. 7, § 4; Wis. Stat. (1935) §§ 103.51 et seq.; Wyo. Laws 1933, c. 37, § 3, as amended by Wyo. Laws 1937, c. 15. The following statutes are very limited in their application: Ariz. Rev. Code Ann. (Struckmeyer, 1928) § 4286; Ill. Laws 1925 p. 378; Kan. Gen. Stat. Ann. (Corrick, 1935) §§ 60-1107; N. J. Laws 1926, c. 207. The Oregon Act was held constitutional in *Starr v. Laundry and Dry Cleaning Workers Local Union No. 101*, 155 Ore. 634, 63 P. (2d) 1104 (1936), as was the Louisiana Act in *Dehan v. Hotel & Rest. Employees and Beverage Dispensers Local U. No. 183*, 159 So. 637 (La. App. 1935); the Washington Act was held unconstitutional in *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 63 P. (2d) 397 (1936).

employment. . . . Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence. . . . [or] Advising, urging, or otherwise causing or inducing without fraud or violence" such acts.⁶⁸

At first sight, if the act protects striking and picketing or advertising in any manner free from fraud or violence, then striking against or picketing a neutral would seem to be protected. However, this kind of conduct is protected only when the case involves or grows out of a labor dispute, and, in accordance with the definition given in the act, such a case is presented if it "*involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees . . . or when the case involves any conflicting or competing interests in a 'labor dispute' . . . of 'persons participating or interested' therein . . .*"

The question is, does this definition include picketing or striking against a neutral to compel him to act against the disputant employer? Although it is not very aptly drawn, the sense must be that a case shall be held to involve or grow out of a labor dispute when it results from an existing labor dispute, that is, "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee," and "involves persons who are engaged in the same industry, trade, craft, or occupation," and so forth. The word "case" must refer to the case presented to the court, and "same industry, trade, craft, or occupation" to the industry in which the labor dispute occurs, in keeping with the definition of a person "participating or interested in a labor dispute" as one against whom relief is sought and who "is engaged in the same industry, trade,

68. The provisions herein quoted (italics supplied) are from the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C.A. §§ 101-115 (1934). Some of the acts (e.g., the Louisiana, New York, Pennsylvania, and Utah statutes cited in note 67, *supra*) but not others (notably the federal act) free from injunctive control "Ceasing to patronize any person or persons" whether singly or in concert and urging others to do the same. The significance of this language will be considered later. The Wisconsin act contains such language but further provides that "nothing herein shall be construed to legalize a secondary boycott." Wis. Stat. (1935) § 103.53.

craft, or occupation *in which such dispute occurs*," and so forth, instead of to the possible common industry of the plaintiff and defendant in the case.⁶⁹

There are perhaps two angles to the question raised inasmuch as the complainant seeking injunctive relief may be the neutral instead of the employer in dispute with union labor. In undertaking to determine whether the act would be applicable to a case where the disputant employer is seeking an injunction to prevent the focusing of coercion on a neutral, the possibilities for construction or interpretation are reasonably narrow. In such event the definition requires only that a labor dispute exist and that the defendants be engaged in the same industry, trade, craft, or occupation in which the dispute occurs, or have direct or indirect interests therein, or be members of the same or an affiliated organization of employers or employees, or otherwise come within the definition, and that such defendants be engaged in any of the conduct covered by section 4. Clearly, then, if the employees of a third person quit work, or threaten to quit work, or are induced to quit work as a consequence of their union membership and in keeping with instructions received, because such person is having business relations with an employer who is engaged in a labor dispute, no injunction may issue as long as their organization is at least affiliated with the organization engaged in the dispute. Perhaps the only real change this may make over sound common law is that such action is not limited to that which is self-protective since the language of the act is broad enough to cover conduct which is primarily directed at coercion of a third party. Likewise, if union men belonging to the organization in dispute, or to an

69. Cf. however, Note (1938) 51 Harv. L. Rev. 746, 747, dealing with *Diamond Full Fashioned Hosiery Co. v. Leader*, 20 F. Supp. 467 (D. C. E. D. Pa. 1937) wherein it is said: "There was probably no labor dispute between the plaintiff and the defendant in the instant case, since the 'controversy concerning terms or conditions of employment' was between the defendant union and the Vogue Company. However, it would seem clear, in view of the fact that the plaintiff corporation and the members of the defendant union were both engaged in manufacturing hosiery, that, in the words of § 13 of the Norris-LaGuardia Act, the case involved 'persons engaged in the same industry, trade, craft or occupation; or have direct or indirect interest therein'; and hence that the case grew out of a labor dispute within the meaning of the statute."

If the action is brought by the employer having the dispute the meaning is clear enough but conceivably, of course, when the court is presented with an action by a third party to enjoin labor practices affecting his business, he and the defendants before the court might be engaged in the same industry although such industry might not be the one in which the "labor dispute" occurs. It is not believed that the interpretation employed in the above mentioned case note was intended. See *infra*, pp. 306.

affiliated organization, engage in a program of advertising, speaking, or patrolling in connection with the neutral establishment, the disputant employer may not prevent this by injunction, subject perhaps to one qualification: that such conduct must cover "giving publicity to the existence of, or the facts involved in" a labor dispute. Therefore, if union men picket the place of business of a retailer for the purpose of announcing to the public that the retailer is selling a nonunion product, the question is, does this amount to giving publicity to the existence of, or the facts involved in a labor dispute?

That such conduct at least goes beyond giving publicity to the existence of a labor dispute seems reasonably clear. As to whether it constitutes giving publicity to the facts involved in a labor dispute, it may be recalled that a "labor dispute" under the act is some controversy over terms or conditions of employment or union efforts to secure the right to arrange terms or conditions of employment.⁷⁰ Therefore, "the facts involved in any labor dispute" may well be only that a particular manufacturer is considered as unfair because he will not employ union labor or accede to union demands concerning terms or conditions of employment or the privilege of arranging the latter. Although announcing that a particular product is nonunion, or unfair, would likely be within the statutory language, if the pickets should undertake to announce the retailer as unfair a more doubtful case is presented. Such conduct could not readily be considered as constituting giving publicity to the existence of a labor dispute, or to the facts involved in a labor dispute. Therefore, although the language referred to seems broad enough to cover picketing a product at the point of distribution to the public as against any demand of the manufacturer for injunctive relief, it apparently is

70. See *Lauf v. E. G. Shinner & Co.*, 58 S.Ct. 578 (1938), which will clear up the confusion resulting from conflicting holdings of lower federal courts concerning what constitutes a labor dispute. A collection of decisions by lower federal courts will be found in *Hellerstein*, *supra* note 46, at 364. In accord with the holding of the Supreme Court are: *American Furniture Co. v. I. B. of T. C. and H. of A. Chauffeurs, Teamsters & Helpers*, 222 Wis. 338, 268 N.W. 250 (1936); *Geo. B. Wallace Co. v. International Ass'n of Mechanics*, 155 Ore. 652, 63 P. (2d) 1090 (1936); *Schuster v. Int'l Association of Machinists, etc.*, 293 Ill. App. 177, 12 N.E. (2d) 50 (1938). See also *Lietzman v. Radio Broadcasting Station WCFL*, 282 Ill. App. 203 (1935). But see *Feller v. Local 144, I. L. G. W. U.*, 121 N.J. Eq. 452, 191 Atl. 111 (1937); *International Ticket Co. v. Wendrich*, 123 N.J. Eq. 172, 196 Atl. 474 (1938); *Thompson v. Boekhaut*, 273 N.Y. 390, 7 N.E. (2d) 674 (1937) (no labor dispute where employer did his own work). Cf. *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 63 P. (2d) 397 (1936).

not broad enough to cover an attempt, by picketing or otherwise, to interfere with the general patronage of a retailer.

The next inquiry is, should the problems just considered be resolved in the same way if the suit is brought by the third party suffering from the union program? The primary issue here concerns the meaning of the expression "involve persons." As has been seen, the act prohibits the issuance of an injunction in any case "involving or growing out of a labor dispute" and such a case is one which "involves persons who are engaged in the same industry," and so forth. In determining whether the "case" which is presented to the court when a neutral seeks an injunction is covered by the act is it necessary to find that both the plaintiff and the defendants are engaged in the same industry, for example, in which the dispute occurs? Or may the case "involve persons" within the meaning of the act if it involves defendants who would fall within any of the mentioned categories without regard to the plaintiff, or vice versa? The wording of the act does not throw any great light on the matter, but if the act was prepared with a view to covering cases where the plaintiff is a third party aggrieved by union conduct and if the expression "same industry . . ." refers in such connection to the common industry of plaintiff and defendants, then whenever a third person's employees act against him their conduct would be protected without regard to the possible fact that the industry in which he may be engaged is not the industry in which the dispute occurs. This reasoning would lead one to believe that when this section was drawn the drafters were thinking about actions brought by the employer having the dispute and not about the possibility of action by an aggrieved third person.⁷¹

Aside from the language of the act and the possibilities of construction, there remains the question of the legislative intent in general. Using the background of this kind of legislation as a guide, there may arise a serious question concerning the presence of any intent to remove from the protection of injunctive relief the practice of focusing compulsion on a neutral in order to force him to aid the union in its struggle. The chief reasons for the adoption of the Norris-LaGuardia act are to be found in the

71. See note 69, *supra*. Of course this language may mean that the act is applicable to suit by a neutral if the neutral and the defendants are engaged in the same industry, etc., as that in which the dispute occurs.

opinions of the Supreme Court in the *Tri-City*⁷² and *Duplex*⁷³ cases decided under the Clayton amendment to the Sherman Act. In the *Duplex* case the Clayton act was held to be inapplicable because the defendants included others than employees of the complainant manufacturer, notwithstanding the claim that the Clayton Act was designed to make possible a greater degree of cooperation between union organizations without regard to the absence of an employer-employee relationship. Also, the position of the union, as reflected in the dissenting opinion of Mr. Justice Brandeis, was that it was merely refraining from conduct that would be of material assistance to the manufacturer, and that any effect of such conduct on actual or prospective customers of the complainant was merely an incidental and perhaps unavoidable result of the union's efforts to protect and advance its own interests by using its combined strength against the offender. Further, as shown by the court in the *Duplex* case, the evidence is clear that the Clayton Act was not designed to protect the secondary boycott.⁷⁴ Finally, the arguments in the House in favor of the Norris-LaGuardia Act by its author in that body show his position that his act was only a rewriting of the principles of the Clayton Act in terms broad enough to foreclose the employer-employee limitation imposed by the court in the *Duplex* case.⁷⁵ It is not at

72. *American Steel Foundries Co. v. Tri-City Central Trades Council*, 257 U.S. 184, 42 S.Ct. 72, 66 L.Ed. 189, 27 A.L.R. 360 (1921).

73. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 41 S.Ct. 172, 65 L.Ed. 349, 16 A.L.R. 196 (1921). The case of *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37, 47 S.Ct. 522, 71 L.Ed. 916, 54 A.L.R. 791 (1927), undoubtedly added much fuel to the fire.

74. Of particular significance is the following language of the spokesman for the Judiciary Committee of the House appearing in 51 Cong. Rec. 9652, 9658 (1914): Mr. Webb: "I will say frankly—when this section was drawn it was drawn with the careful purpose not to legalize the secondary boycott, and we do not think it does. . . . It does legalize the primary boycott; it does legalize the strike; it does legalize persuading others to strike, to quit work, and the other acts mentioned . . . , but we did not intend, I will say frankly, to legalize the secondary boycott. . . ."

"I say again—and I speak for, I believe, practically every member of the Judiciary Committee—that if this section did legalize the secondary boycott there would not be a man to vote for it. It is not the purpose of the committee to authorize it and I do not think any person in this House wants to do it."

75. Mr. LaGuardia: "There is not an underlying principle written into this bill which Congress did not enact into law back in 1914, when the Clayton Act was passed. Gentlemen, this problem is not new. Congress struggled with it before it wrote the provisions into the Clayton Act in 1914 exactly as we are trying to do today." 75 Cong. Rec. 5478 (1932). See also H. R. Rep. No. 669, 72 Cong., 1st Sess. (1932) 7-8, to the same effect.

In *New Negro Alliance v. Sanitary Grocery Co.*, 58 S.Ct. 703, 707 (1938), the Court, speaking through Mr. Justice Roberts, said: "The legislative history of the act demonstrates that it was the purpose of the Congress further

all surprising that labor should feel privileged to deny its services when their effect will be to injure labor itself, and that such a denial should not be emasculated by cutting off the force of organized effort, the source of its only real power. If this was the goal for which labor was striving then it is reasonable to believe that the purpose of the legislation here considered was to give labor freedom to avoid division against itself by allowing full cooperation when a dispute with some employer arose. There need be no conflict between such a purpose and the use of direct compulsion against one not a party to the dispute. If compulsion is incidental to organized efforts against the offending employer in defense of unionism, then it must be endured. Intentional compulsion of neutrals as a part of union policy and activity is another thing.⁷⁶

The fact that there is no provision in the Norris-LaGuardia Act dealing directly with the question of patronage as a particular matter, such as may be found in certain of the state acts,⁷⁷ may be a further indication of a legislative intention not to protect the secondary boycott. However, although the Wisconsin statute includes in its protection "ceasing to patronize or employ any person," it further provides in the same section, "but nothing herein shall be construed to legalize a secondary boycott."⁷⁸ Evidently the Wisconsin lawmakers felt that ceasing to patronize or employ any person might be harmonious with the exclusion of the secondary boycott from the protection of the act.⁷⁹ Indeed, such a position would be sound, for only when there is a combined effort to injure the patronage of a neutral for the purpose of forcing him to aid in the struggle is the secondary boycott involved in

to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that Act."

76. The position taken in several lower court decisions in New York that the New York act does not make lawful any practice which was unlawful before its adoption [*Grandview Dairy v. O'Leary*, 158 Misc. 791, 285 N.Y. Supp. 841 (1936); *B. Gertz v. Randau*, 162 Misc. 786, 295 N.Y. Supp. 871 (Sup. Ct. 1937); *Weil & Co. v. Doe*, 5 N.Y. S. (2d) 559 (Sup. Ct. 1938); *Chapman v. Doe*, 7 N.Y. S. (2d) 470 (Sup. Ct. 1938)], ostensibly has just been approved by the Court of Appeals in a memorandum decision upholding the Supreme Court in *Remington Rand, Inc. v. Crofoot*, 13 N.E. (2d) 37 (N.Y. Ct. App. 1938), affirming 248 App. Div. 356, 289 N.Y. Supp. 1025 (1936). See 3 Labor Rel. Rep. 389 (1938).

77. See note 68, *supra*.

78. Wis. Stat. (1935) § 103.53. Although the New York act has a "ceasing to patronize" provision the New York courts have found that the secondary boycott was not made legal. See cases cited in note 76, *supra*.

79. The Clayton Act itself has similar language dealing with the withholding of patronage.

this kind of case. Even without language definitely excluding the secondary boycott, the view that the provision dealing with patronage was not intended to protect the coercion of neutrals by attempts to injure or divert their patronage might be supported by the fact that the acts limit the protection given to advertising, speaking, or patrolling, to conduct of this kind which is designed to give publicity to the existence of or the facts involved in any labor dispute, as we have seen.⁸⁰

There is a possibility at least that the courts may take the position that a case cannot involve or grow out of a labor dispute unless the dispute is with the plaintiff. That is to say, they may resort to the construction that if there is no labor dispute with the plaintiff the action which he brings to secure injunctive relief against striking or picketing aimed at destroying his liberty will not constitute a case involving or growing out of a labor dispute, thus interpreting the term "labor dispute" to mean such a dispute with the plaintiff in the "case." Perhaps under the broad language used the only substantial basis for such an interpretation would be the history of this type of legislation.⁸¹ However, this method of construing the act would leave available to the neutral, harassed and injured by a conflict to which he is not a party, the remedy of the injunction to safeguard his business, and at the same time would prevent the employer with whom the dispute exists from thwarting the efforts of the union to compel him to come to terms. As previously shown, the use of coercion against a neutral has generally been treated as unlawful both with respect to the neutral and also with respect to the party in dispute with the union. The construction here suggested would constitute a modification of this view, leaving available to the injured neutral the customary modes of relief and merely depriving the employer of injunctive relief to stop a program effective against him.⁸²

80. See the discussion of this language, *supra* p. 305. Cf. *Grandview Dairy v. O'Leary*, 158 Misc. 791, 285 N.Y. Supp. 841 (1936); *Manhattan Steam Bakery v. Schindler*, 250 App. Div. 467, 294 N.Y. Supp. 783 (1937); *Goldfinger v. Feintuch*, 276 N.Y. 281, 11 N.E. (2d) 910 (1937); and *Canepa v. "John Doe,"* 277 N.Y. 52, 12 N.E. (2d) 790 (1938).

81. For a detailed discussion, see *Frankfurter and Greene*, *op. cit. supra* note 2, ch. 4, 5.

82. See *Muncie Bldg. Trades Council v. Umbarger*, 17 N.E. (2d) 828 (Ind. 1938); *Blumenthal v. Feintuch*, 153 Misc. 40, 273 N.Y. Supp. 660 (Sup. Ct. 1934); *Blumenthal v. Weikman*, 154 Misc. 684, 277 N.Y. Supp. 895 (Sup. Ct. 1935); *American Gas Stations, Inc. v. Doe*, 250 App. Div. 227, 293 N.Y. Supp. 1019 (1937); *B. Gertz v. Randau*, 162 Misc. 786, 295 N.Y. Supp. 871 (Sup. Ct. 1937); *Mile. Reif, Inc. v. Randau*, 166 Misc. 247, 1 N.Y. S. (2d) 515 (Sup. Ct. 1937); *Weil & Co. v. Doe*, 5 N.Y.S. (2d) 559 (Sup. Ct. 1938); *Canepa v. "John Doe,"*

In further support of the right of the neutral, one may argue that in the definition of a "labor dispute" the legislators indicated conclusively that they intended to make legitimate the end sought when the dispute involved terms or conditions of employment or an effort to arrange them through representation or association—in short, to obtain a collective agreement. Except for disputes falling within these categories, ends considered illegitimate at common law remain so under the statutes. Now, as previously pointed out,⁸³ undertaking to coerce a neutral is generally considered destitute of a legitimate end at common law because no circumstances constituting a labor dispute with him exist. This being true, the position of the neutral under the statutes might remain unchanged. Of course, the above analysis is contrary to the treatment of the *Goldfinger* case by the New York Court of Appeals;⁸⁴ yet the opinion does not foreclose conjecture concerning the court's real evaluation of the case, inasmuch as the court permitted a practice which would have been valid under the common law as found in that state, namely, picketing a product, and denied validity to a practice which, ostensibly at least, would be valid under the statute, namely, general picketing of a retailer.⁸⁵ It is believed that the real difficulty here was in treating the act as applicable to the case notwithstanding the fact that the action was brought by the neutral. The court's decision and position generally would have been perfectly sound in the ab-

277 N.Y. 52, 12 N.E. (2d) 790 (1938). But see *Goldfinger v. Feintuch*, 276 N.Y. 281, 11 N.E. (2d) 910 (1937). Cf. particularly, *Hydrox Ice Cream Co., Inc. v. Doe*, 293 N.Y. Supp. 1013 (Sup. Ct. 1937), decided on the same day and by the same court as the *American Gas Station* case, *supra*. *Davega-City Radio, Inc. v. Randau*, 166 Misc. 246, 1 N.Y.S. (2d) 514 (Sup. Ct. 1937), is contra to the *Mlle. Reif* case, *supra*.

See also, *Union Premier Food Stores v. Retail Food C. & M. Union, etc.*, 98 F. (2d) 821 (C.C.A. 3rd, 1938), where the court found the absence of a labor dispute when the employer was willing to bargain with either of two rival unions which the National Labor Relations Board might choose in a pending decision as being entitled to represent the employees, and enjoined all picketing pending such decision. The dissenting opinion discloses the anomalous nature of the majority opinion and its very questionable attempt to avoid the operation of the Norris-LaGuardia Act and to distinguish *Lauf v. E. G. Shinner & Co.*, 58 S.Ct. 578 (1938).

83. See *supra*, p. 280.

84. *Goldfinger v. Feintuch*, 276 N.Y. 281, 11 N.E. (2d) 910 (1937). For a federal district court decision treating the act as applicable to action brought by a third party, see *Diamond Full Fashioned Hosiery Co. v. Leader*, 20 F. Supp. 467 (D. C. E. D. Pa. 1937). The opinion of the court is not at all convincing.

85. The fundamental reason for this may have been that the court does not believe that the New York anti-injunction law was designed to protect the secondary boycott. See the concurring opinion of Judge Lehman in *Goldfinger v. Feintuch*, 276 N.Y. 281, 11 N.E. (2d) 910, 914-915 (1937), and the cases cited in note 76, *supra*.

sence of the statute, for the whole question would then have been whether the conduct of the union was primarily designed to coerce the retailer into acting against the manufacturer or was simply an attempt to notify the public of the nonunion character of the manufacturer's product at the point where the buying public could best be reached. This problem could and should have been resolved in favor of the latter theory—a desirable policy to pursue whenever there is doubt.

CONCLUSION

The case history of labor's legal position in the employment of its weapons seems definitely to indicate that while in modern times the great majority of courts have been willing to protect the workingman in his efforts to organize, and, through organization, to seek the support of all others when a legitimate dispute with some employer was being waged, they have been unwilling to permit labor to force such support. Conduct designed to intimidate others outside the immediate dispute, whether morally or physically, has been disapproved almost uniformly. On the contrary, attempts at peaceful persuasion have been protected. Conflicting attitudes on the legality of picketing have resulted from different opinions concerning its effect, that is, whether or not it is intimidating. But whenever found to have this characteristic as practiced there has been uniformity in denouncing it. Similarly any other method having a like intentional effect has been treated the same. With a free people legitimate competition is sacred. To destroy competition is to strike a blow at freedom. In the economic conflict between employer and employed the support of others is essential. For it both parties to the conflict vie. It may be wooed and won but not compelled. This seems to be the moving spirit of the cases. Difficulty has been encountered in separating intentional compulsion from injury incidental to cooperative support of the organization and to reasonably effective public appeal.

From a consideration of the cases, the feeling comes that labor's major struggle has been to secure recognition of its claimed privilege to use the entire strength of its organization against an offending employer in order to bring him to terms, and that labor has not been so much concerned, as a direct endeavor, with forcing the aid of neutrals. The penalty for going beyond such a program and letting ambition impel activity aimed at direct coercion of third parties has been the legal proscription

of measures that, if carefully directed and controlled, might have been approved as defensive. It is believed that courts should be reluctant to destroy the power of organization—for what else has labor?—under the guise of protecting third parties from coercive practices. Certainly a local is no match for an employer having great resources, and labor history teaches that action to bring an objecting employer into line has frequently had its genesis in threats of other manufacturers in the industry to refuse to renew their union contracts in order to meet nonunion competition. A situation of this kind calls for full union cooperation.

The Norris-LaGuardia Act and like legislation should be readily accepted not only as protecting efforts to secure the right to bargain collectively, without regard to the employer-employee relationship, but also as making possible concert of action on the part of affiliated labor groups against an employer who does not see with the union on questions concerning terms or conditions of employment, notwithstanding incidental hardships to third parties.⁸⁶ At the same time, direct and intentional coercion of neutrals, lacking the factors which justify coercion of an offending employer, should be denied protection—at least in favor of the neutral—until experience has clearly demonstrated that such a course is essential to the reasonable protection and advancement of legitimate union interests.⁸⁷ That there is a great interdependency under our economic organization between productive and distributive units may be true, but unless there is common control the claimed third party neutral should not be identified with the offender for the purpose of finding legal justification for coercive practices.⁸⁸ The proportionate interest of the individual consumer in the affairs of the nonunion manufacturer, assuming his goods may be bought more cheaply, is as great as that of the retailer, yet should the exercise of his freedom to dispose of his

86. See *Levering & Garrigues v. Morrin*, 71 F. (2d) 284 (C.C.A. 2nd, 1934). Employers, of course, are opposed to this practice. See "Employment Relations," approved by the National Association of Manufacturers, December 1937, reprinted 1 Labor Rel. Rep. 383 (1937), commented on by Gall and Smethurst, *Amending the Wagner Act: The Problem from the Manufacturer's Viewpoint* (1938) 5 Law & Contemp. Prob. 306, 308 et seq.

87. See *Grandview Dairy v. O'Leary*, 158 Misc. 791, 285 N.Y. Supp. 841 (1936); *Long Island Drug Co., Inc. v. Devery*, 6 N.Y. S. (2d) 390 (Sup. Ct. 1938); *Canepa v. "John Doe,"* 277 N.Y. 52, 12 N.E. (2d) 790 (1933); *Geo. B. Wallace Co. v. International Ass'n, etc.*, 155 Ore. 652, 63 P. (2d) 1090 (1936), Sayre, *supra* note 3, at 700-701.

88. Justice Collin refuted an attempt by counsel for defendant to identify the retailer with the manufacturer in his opinion in *Goldfinger v. Feintuch*, 159 Misc. 806, 288 N.Y. Supp. 855 (Sup. Ct. 1936).

patronage as he may see fit expose him to coercive practices?⁸⁹ On the other hand, to incidental hardships he must submit. The final inquiry in cases involving coercion has never been more effectively suggested than by District Judge Hough: "The priest of Juggernaut may be glad that the car rolls over a personal enemy, but the car rolls primarily to glorify the god within."⁹⁰ Does the "car roll" against third party neutrals, or is damage to them merely an incident of labor's attempt to maintain its position against the one who threatens its power or its cause?

89. Cf. Hellerstein, *supra* note 46, at 354.

90. *Gill Engraving Co. v. Doerr*, 214 Fed. 111, 115 (D. C. S. D. N.Y. 1914).

The Work of the Louisiana Supreme Court for the 1937-1938 Term*

It is intended in this survey to examine the work of the highest appellate court of Louisiana during the last judicial year—from October 1937 to August 1938.¹ This will be done by furnishing statistical studies of the judicial business handled, together with a panoramic topical consideration of the more important developments in the jurisprudence during the period considered. In this manner, attention will be focused upon general trends in the progress of the law as evidenced in the decided cases, emphasis will be laid upon matters of importance and some discussion will be given to a variety of subjects of interest.

I. STATISTICAL SURVEY

The various tables prepared in the statistical survey reveal a number of interesting facts. During its 1937-1938 term, the Supreme Court disposed of 268 cases in written opinions.² The corresponding figures for each of the four preceding terms were: in 1933-34, 371 (an average of 53 cases per judge); in 1934-35, 341 (average of 48 cases per judge); in 1935-36, 268 (38 cases per judge); and in 1936-37, 252 (36 cases per judge). The fact that the number of cases disposed of annually has remained substantially the same in the past three terms after an abrupt drop from 48 to 38 cases per judge between the 1934-35 and 1935-36 terms, is largely reflected in and explained by the number of cases filed in the Supreme Court during each of the years mentioned above. In

* This symposium has been contributed by the members of the faculty of Louisiana State University Law School as follows: Statistical Survey—Paul M. Hebert and Carlos E. Lazarus; Procedure, Security Contracts, Prescription, Insurance—Henry G. McMahon; Family Law, Successions, Mineral Rights—Harriet S. Daggett; Conventional Obligations—J. Denson Smith; Sale, Lease, Partnership, Banking and Negotiable Instruments—Paul M. Hebert; Torts and Workmen's Compensation, Public Law—Thomas A. Cowan; Criminal Law and Procedure—Jerome Hall; Bankruptcy—Ira S. Flory; Corporations—Dale E. Bennett.

1. This Review will make a similar survey each year, and a survey of the work of the Louisiana Legislature will be made after each legislative session. Cf. Hebert and Lazarus, *The Louisiana Legislation of 1938* (1938) 1 LOUISIANA LAW REVIEW 80.

2. This tabulation includes all cases for the 1937-38 term officially reported in Volumes 188, 189, and 190 of the Louisiana Reports.

1933-34 the total number of cases docketed in the Supreme Court, including applications for writs, was 538; in 1934-35, 525; in 1935-36, 493; in 1936-37, 494.³

These figures indicate that the Supreme Court, at the present time, is keeping abreast of its judicial business in that it disposes annually of a number of cases practically equivalent to the number of new matters docketed in the Court. Thus Table I shows that, with a total of 478 cases (including 213 writ applications) filed during the 1937-38 term, 459 cases (including 191 writ applications) were actually disposed of. This was an average of 65.6 matters per member of the Court.

During 1937-38, a total of 163 applications for rehearings were considered. Yet, despite the fact that rehearings were granted in only 13 instances (7.9%), a substantial portion of the Court's time must be devoted to their consideration (see Table VII).⁴

In view of the Supreme Court's heavy burden of reviewing both the law and the facts in all civil cases⁵ and the additional constitutional mandate requiring at least two justices to read each record,⁶ the disposition of such a large number of matters at each term is noteworthy—particularly so since the Court does not employ the memorandum opinion found so useful in other jurisdictions.⁷

3. The figures covering the number of cases filed in the Supreme Court are those furnished from the Office of the Clerk of the Supreme Court of Louisiana. The cooperation received from the Clerk and his assistants is here gratefully acknowledged.

4. In a few other jurisdictions congested dockets have been partially attributed to increase in the number of applications for rehearing. For discussion of this problem see Cook, *The Rehearing Evil* (1928) 14 Iowa L. Bull. 36. The large number of applications for rehearings does not present as serious a problem in Louisiana as it does in some other states because there is no oral argument on the application. Art. 913, La. Code of Practice of 1870.

5. La. Const. of 1921, Art. VII, § 10.

6. La. Const. of 1921, Art. VII, § 6.

7. For example, in Wisconsin, a Rule of Court provides: "In cases where the order or judgment is affirmed, opinions will not hereafter be written unless the questions involved be deemed by this court of such special importance or difficulty as to demand treatment in an opinion . . ." The Supreme Court of Wisconsin in 1934-35 disposed of 85 cases amounting to 23.1% of the cases before it in memorandum opinion. *The Work of the Wisconsin Supreme Court for the August 1934, and January 1935, Terms* (1935) 11 Wis. L. Rev. 5, 6, 8-9. The use of the memorandum opinion might easily be resorted to in Louisiana as a means of lightening the burden imposed on our appellate courts. But cf. La. Const. of 1921, Art. VII, § 1: " . . . The judges of all courts shall refer to the law and adduce the reasons on which every definitive judgment is founded." However, this latter provision should prove no obstacle to the adoption of the memorandum opinion in Louisiana in the light of (1) the accepted practice of using abbreviated opinions in cases closely connected with others decided with written opinions; and (2) the practice of not assigning detailed reasons when writs are denied, despite the provisions of La. Const. of 1921, Art. VII, § 2.

Of a total of 209 cases appealed from the District Courts throughout the State, 67% of the judgments were affirmed, 20% were reversed and 13% were modified or otherwise disposed of (see Table II). In 34 cases considering decisions of the Courts of Appeal on writs of review, only 26.5% were affirmed, 58.8% were reversed and 14.7% were modified or otherwise disposed of (see Tables II and III).

The classifications in Table IV are arbitrarily chosen for the purpose of topical analysis since many of the cases obviously involve more than one legal point. The tabulation is, therefore, based upon the main subject matter to which the decisions relate. It is especially significant that 18.7% of the cases deal with Criminal Law and Procedure. The next largest groups include: Procedure and Practice—12.7%; Divorce—6.4%; Succession matters—6.4%; Torts and Workmen's Compensation—6.4%; Mineral Rights—6.0%; Taxation—5.2%; Insurance—3.4%.

The bulk of the litigation reaching the Supreme Court is on appeal from the District Courts, such appeals accounting for 78% of the reported cases while only 12.7% were on writs of review to the Courts of Appeal (see Table V). The geographical analysis of appeals from the District Courts reveals that the parish of Orleans gave rise to 21.3% of the cases so appealed, the parish of Caddo provided 13.1%, East Baton Rouge parish sent 6%, and the other parishes supplied the remaining 59.6% (see Table VI).

TABLE I

VOLUME OF JUDICIAL BUSINESS

Cases disposed of with written opinions.....	268
Applications for writs considered.....	191
Applications for rehearings disposed of.....	163
Cases docketed during 1937-38 term (excluding writ applications).....	265
Applications for writs filed during 1937-38 term.....	213
Total matters docketed during 1937-38 term.....	478
Total cases handled by the Court (excluding rehearing applications)....	459
Grand total of matters handled (including rehearing applications).....	622

TABLE II

DISPOSITION OF LITIGATION

	On Appeal from District Courts	On Appeal from City Courts	On Certi- orari or Review from Appel- late Courts	On Super- visory Writs to District Courts	On Certifi- cate from Courts of Appeal	On Orig- inal Juris- diction	TOTAL
Affirmed	140	2	9	..	..	..	151
Amended and affirmed.	11	..	2	..	..	..	13
Reversed and rendered.	29	..	9	..	..	..	38
Affirmed in part and reversed in part	2	..	1	..	..	..	3
Affirmed in part, re- versed in part and remanded	1	..	1	..	..	..	2
Reversed and remanded	13	..	3	..	..	..	16
Remanded on motion...	1	..	..	..	..	..	1
Reversed and judgment of lower court rein- stated .....	..	..	8	..	..	..	8
Motion to dismiss ap- peals granted	3	..	..	..	..	..	3
Motion to dismiss ap- peals refused	7	..	..	..	..	..	7
Motion to dismiss writs of certiorari or re- view granted .....	..	..	1	..	..	..	1
Motion for re-entry of judgment granted ...	..	..	..	..	..	1	1
Transferred to Court of Appeals for lack of jurisdiction	2	..	..	..	..	..	2
Writs made peremptory	..	..	..	11	..	..	11
Writs made peremptory in part, recalled in part .....	..	..	..	1	..	..	1
Writs recalled .....	..	..	..	7	..	..	7
Certified questions answered .....	..	..	..	..	2	..	2
Petitions dismissed ....	..	..	..	..	..	1	1
TOTALS	209	2	34	19	2	2	268

TABLE III

DISPOSITION OF CASES REVIEWED ON WRIT OF CERTIORARI
FROM COURTS OF APPEAL

	Parish of Orleans	First Circuit	Second Circuit	TOTAL
Affirmed	4	3	2	9
Amended and affirmed .....	..	1	1	2
Reversed and rendered	2	1	6	9
Reversed in part and affirmed in part Affirmed in part, reversed in part and remanded	1	..	..	1
Reversed and remanded .....	..	..	1	1
Court of appeal reversed and lower court judgment reinstated .....	..	1	2	3
Writs dismissed	2	3	3	8
TOTALS .....	..	1	..	1
	9	10	15	34

TABLE IV

TOPICAL ANALYSIS OF DECISIONS

Attorneys	2
Banking and Negotiable Instruments	5
Bankruptcy	2
Carriers	5
Constitutional Law	9
Conventional Obligations	9
Corporations	4
Courts	8
Criminal Law and Procedure	50
Divorce	17
Expropriation	1
Father and Child	1
Husband and Wife	2
Insane Persons	1
Insurance	10
Labor Law	1
Lease	2
Mineral Rights	16
Minors and Tutorship	2
Mortgages	5
Partnership	1
Pledge	2
Practice and Procedure	34
Prescription	9
Receivers and Receivership Procedure	3
Sale	9
Schools and School Districts	2
Statutes	4
Successions	17
Suretyship	2
Taxation	14
Torts and Workmen's Compensation	17
Trade Marks and Trade Names	1
Telegraphs and Telephones	1

TABLE V

JURISDICTIONAL ORIGIN OF CASES

Appeals from District Courts	209
Appeals from City Courts	2
On Writs of Review from Courts of Appeal	34
Questions certified by Courts of Appeal	2
On Supervisory Writs to District Courts	19
Petitions and Motions in Supreme Court	2
TOTAL	268

TABLE VI

GEOGRAPHICAL ANALYSIS OF APPEALS FROM DISTRICT COURTS

<i>Parish</i>	<i>No. of Cases</i>	<i>Parish</i>	<i>No. of Cases</i>
Arcadia	5	Natchitoches	2
Ascension	1	Ouachita	8
Beauregard	2	Orleans Criminal	5
Bienville	2	Orleans Civil	52
Bossier	2	Pointe Coupee	1
Caddo	35	Rapides	8
Calcasieu	4	Red River	1
Claiborne	3	Sabine	2
Concordia	2	St. Bernard	2
DeSoto	3	St. Helena	1
East Baton Rouge	16	St. John the Baptist	1
Evangeline	1	St. Landry	1
Franklin	1	St. Martin	1
Grant	1	St. Mary	2
Iberia	1	St. Tammany	1
Jackson	1	Tangipahoa	7
Jefferson	6	Terrebonne	3
Jefferson Davis	2	Union	2
Lafourche	2	Washington	2
LaSalle	2	Webster	4
Lincoln	3	West Carroll	1
Livingston	2	Winn	1
Madison	1	TOTAL	209
Morehouse	3		

TABLE VII

DISPOSITION OF APPLICATIONS FOR WRITS AND REHEARINGS

	Number	Granted	Refused
Applications for Rehearings	163	13	150
Applications for Writs	191	40	151
TOTALS	354	53	301

TABLE VIII

DISSENTS*

	With Opinion	Without Opinion	Concurrence in written dissenting opinion	TOTAL
O'Niell, C. J.	10	11	1	22
Fournet, J. ....	..	2	..	2
Higgins, J.	1	..	..	1
Land, J.	1	..	..	1
Odom, J.	2	14	1	17
Ponder, J.	1	..	..	1
Rogers, J. ....	..	2	..	2
TOTALS	15	29	2	46

* In cases wherein rehearings have been granted, the dissents here tabulated are those from the opinion on rehearing. Dissents from the original opinions therein have not been included, since in such cases the final opinion of the court is that rendered on the rehearing. Total number of cases in which dissents were expressed—33.

II. PROCEDURE

For the past decade the decisions of the Supreme Court have, on the whole, evidenced a marked trend towards a liberality of procedure. With but one possible exception, it will be seen that all of the cases involving adjective law decided during the past term show that the momentum of this movement has not diminished. While the majority of these decisions required little more than the application of rudimentary principles, at least two cases were of landmark importance.

COURTS. In *O'Brien v. Delta Air Corporation*,¹ it was again held that a court having territorial jurisdiction over the place where a contract of carriage was breached had jurisdiction *ratione personae* to try an action in damages therefor.

Three cases involved the exercise of the authority of Louisi-

1. 188 La. 911, 178 So. 489 (1938).

ana courts to restrain the prosecution, by Louisiana citizens, of transitory causes of action in the courts of other states. In two of these cases,² the court restrained a Louisiana citizen from suing other Louisiana citizens or corporations in the courts of Mississippi, where the purpose of such suits was to take advantage of the materially different substantive law of the latter state. In the third case,³ however, the court refused to enjoin the prosecution of an action instituted by a Louisiana citizen in the Mississippi courts—the accident having occurred in the latter state, and the action being brought against a Louisiana corporation and its agent, who was a resident of Mississippi. All of the plaintiff's witnesses were citizens of Mississippi. The mere inconvenience to which the defendant Louisiana corporation was subject was held insufficient, in the face of the above facts, to justify any restraining of the Mississippi litigation.

EXCEPTIONS. The trite principle that the well pleaded allegations of the petition must be deemed admitted for the purposes of the trial of an exception of no cause of action was affirmed by two cases.⁴ The similarly well settled rule that a vague petition is not ordinarily subject to the exception of no cause of action was also affirmed.⁵

*Shreveport Long Leaf Lumber Co. v. Jones*⁶ involved exceptions which were more interesting than meritbrious. When the record in a former suit on the same subject matter disappeared from the files of the court, plaintiff instituted a new suit, and in the second petition recited that he took a nonsuit in the former action. All costs of the first suit were paid to defendant. The defendant's exception of *lis pendens* was properly held by the court to be frivolous. Defendant also moved unsuccessfully to recuse the judge-ad-hoc, alleging *inter alia* that since his appointment plaintiff's representatives and counsel had visited his office several times. Defendant also excepted to plaintiff's corporate capacity on the ground that, since there was no allegation of the payment of its corporation franchise tax, it lacked capacity to bring the suit. Since no statute prohibits a Louisiana corporation from using the courts unless it first pays its franchise tax, this excep-

2. *Natalbany Lumber Co. v. McGraw*, 188 La. 863, 178 So. 377 (1938); *Daniels v. McGraw*, 188 La. 874, 178 So. 380 (1938).

3. *New Orleans Brewing Co. v. Cahall*, 188 La. 749, 178 So. 339 (1937).

4. *Ward v. Leche*, 189 La. 113, 179 So. 52 (1938); *Dusenbury v. Board of Com'rs, etc.*, 190 La. 694, 182 So. 719 (1938).

5. *Brunson v. Mutual Life Ins. Co. of New York*, 189 La. 743, 180 So. 506 (1938).

6. 188 La. 519, 177 So. 593 (1937).

tion was overruled. The nonpayment of this tax was held to be a matter personal to the state.

Two cases involved the nonjoinder of parties. In one,⁷ the court held that in an action to enjoin a school board from executing a contract alleged to have been let illegally, the person to whom the contract was awarded was a necessary party defendant. The other, *Pierce v. Robertson*,⁸ again applied the rule that all beneficiaries under Article 2315 of the Civil Code must join in any action to recover damages for wrongful death. In the event that a beneficiary would not join as co-plaintiff, the court held that he must be made a defendant and ordered to assert his rights as a plaintiff therein, or be precluded thereafter from asserting them.

One of the most important cases on cumulation of actions handed down in recent years was *Keel v. Rodessa Oil & Land Co.*⁹ There, the plaintiff sought to recover an undivided one-third interest in immovable property. A petitory action against a defendant in possession was cumulated with an action to establish title brought against another defendant out of possession. Exceptions to the petition on the grounds that it had "improperly [cumulated] distinct causes of action and [had] improperly joined the parties defendant" were maintained by the trial court. Finding a community of jural interest between the two actions, the Supreme Court reversed the judgment appealed from, overruled the exceptions and remanded the case for trial. The decision is thoroughly harmonious with the trend of liberality of practice which our courts have been following during the past decade. It is unfortunate that the opinion perpetuated the myth that our procedure looks to the common law for rules relating to joinder.¹⁰

EXECUTORY PROCESS. The most important question presented in *Coreil v. Vidrine*¹¹ was whether appeal or injunction was the proper procedure to point out the lack of authentic evidence to support an order of foreclosure under executory process. The court, following a number of prior cases,¹² held that appeal was the proper remedy; and refused to consider the question when it was presented under a rule nisi for injunctive relief. Contrary

7. State ex rel. James H. Aitken & Sons v. Orleans Parish School Board, 190 La. 193, 182 So. 324 (1938).

8. 190 La. 377, 182 So. 544 (1938).

9. 189 La. 732, 180 So. 502 (1938).

10. On this point, see Flory and McMahon, The New Federal Rules and Louisiana Practice (1938) 1 LOUISIANA LAW REVIEW 45, 61 n. 120.

11. 188 La. 343, 177 So. 233 (1937).

12. Of the seventeen cases cited by the court (188 La. at 349-350, 177 So. at 235) in support of its position, the following are not in point: Wood &

rules have been announced by our Supreme Court on this subject at various times. Curiously enough, in the only case in which the conflicting authorities seemed to have been called to the attention of the court,¹³ it held that injunction was the proper remedy in such cases. Three cogent reasons seem to require this rule.¹⁴ It is unfortunate that the Supreme Court has again breathed life into the contrary view. In *Hibernia Bank & Trust Co. v. Lacoste*,¹⁵ the court again held that a proceeding *via ordinaria* to enforce a mortgage, prosecuted against a curator ad hoc appointed to represent the nonresident mortgagor, was a proceeding *in rem*. When the plaintiff, which had proceeded to enforce the mortgage and obtain a personal judgment against the mortgagor, discovered that the latter was a nonresident, it was allowed to convert the proceeding into one purely *in rem* to enforce the mortgage, upon having an attorney at law appointed to represent the absent defendant.

REAL ACTIONS. A number of cases on this subject involve merely the application of rudimentary principles of civil law to

Roane v. Wood, 32 La. Ann. 801 (1880); *Miller, Lyon & Co. v. Cappel*, 36 La. Ann. 264 (1884); *Van Raalte v. Congregation of the Mission*, 39 La. Ann. 617, 2 So. 190 (1887); *Buck v. Massie*, 109 La. 776, 33 So. 767 (1901); *State ex rel. Pelletier v. Sommerville, Judge*, 112 La. 1091, 36 So. 864 (1904). The following cases cover the point only by way of dictum: *Durac v. Ferrari*, 25 La. Ann. 80, 81 (1873); *Montejo v. Gordy*, 33 La. Ann. 1113, 1115 (1881). In addition to the pertinent cases cited by the court, *Bank of Coushatta v. Burch*, 177 La. 465, 148 So. 680 (1933) supports its position.

13. *Jones v. Bouanchaud*, 158 La. 27, 103 So. 393 (1925). Accord: *Chambliss v. Atchison*, 2 La. Ann. 488 (1847); *Hackemuller v. Figueroa*, 125 La. 307, 51 So. 207 (1910). See also, *Calhoun v. Mechanics' & Traders' Bank*, 30 La. Ann. 772, 780 (1878). Cf. *Ricks v. Bernstein*, 19 La. Ann. 141 (1867).

14. First—"a party desiring to bring before [a] court the question of the sufficiency of the evidence on which the order issued, and other questions besides, would be obliged to resort to an appeal for the one and an injunction for the other, thus involving that multiplicity which the law abhors." *Calhoun v. Mechanics' & Traders' Bank*, 30 La. Ann. 772, 780 (1878). Second—to require the defendant in executory process to post the necessary suspensive appeal bond would, in the vast majority of cases, result in the deprivation of the only remedy which a contrary view would permit. Third—the defendant in executory process should not only be permitted, but should be required, to seek the necessary relief from the trial court which committed the error before invoking the aid of the appellate courts. Cf. *Ascension Red Cypress Co. v. New River Drainage District*, 169 La. 606, 125 So. 730 (1930).

It is folly, in this day of busy judges, to ask, with Wyly, J.: "Why should the same judge who decided the evidence sufficient, and issued the fiat, grant an injunction and restrain it on the ground that the evidence he had just pronounced sufficient, is insufficient?" *Naughton v. Dinkgrave*, 25 La. Ann. 538, 539 (1873). Such an argument ignores the unfortunate actualities. The point is that trial judges seldom, if ever, examine minutely the evidence annexed to a petition for executory process to determine whether it is sufficient or authentic, unless some question thereof is raised by the defendant. In the very great majority of cases, the trial judge is not only willing, but anxious, to correct any error of oversight.

15. 190 La. 162, 182 So. 314 (1938).

the court's findings on issues of fact.¹⁶ *Rudd v. Land Co.*¹⁷ escapes this classification only because of one point decided. Plaintiff brought a jactitory action¹⁸ and, in order to make specific allegations of the slanderous acts, incorporated an alleged tax sale to defendant and an alleged act of sale thereunder into his petition by reference. The answer denied the slander, alleged the validity of the acts and prayed for the rejection of plaintiff's demand. The court held that no question of title was presented under the issues framed by the pleadings. Since the plaintiff had proven possession of the property, defendant was ordered to institute a petitory action within 60 days.

Judge Westerfield is reputed once to have said, when considering an obviously inflated claim for damages, that the injunction "Ask and ye shall receive" had no application to such worldly affairs as lawsuits. *Cook v. Martin*¹⁹ would lead one to suspect that it is applicable to litigation, but often with a result opposite to that intended by the person invoking it. Plaintiffs instituted a petitory action to be decreed owners of property once held by the community existing between their paternal grandparents. What purported to be an act of sale executed by the grandmother, after the death of her husband, was attacked as a forgery. In the alternative, plaintiffs demanded that (if the instrument attacked be held genuine) they be decreed the owners of their grandfather's half of the property. The court found the evidence insufficient to prove the act a forgery.²⁰ Further, it held that, by instituting the suit, plaintiffs had accepted their grandmother's succession unconditionally, and had thereby assumed her obligation of warranty of the whole title. Consequently, plaintiffs were held estopped from attacking the sale even to the extent of claiming the half which their grandfather had owned. The opinion induces one to believe that if plaintiffs had claimed only a half-interest in the property they might have recovered.

16. *Duffoure v. Constantin* (*Jambon v. Same*, *Pitre v. Same*), 189 La. 826, 181 So. 183 (1938); *Foscue v. Mitchell*, 190 La. 758, 182 So. 740 (1938).

17. 188 La. 490, 177 So. 583 (1937), reversing *Rudd v. Land Co.*, 172 So. 804 (La. App. 1937).

18. For a discussion of the action of jactitation, see Comment (1938) 12 *Tulane L. Rev.* 254.

19. 188 La. 1063, 178 So. 881 (1938).

20. Some loose language in the opinion might lead the reader to believe that the court resolved this question against plaintiffs also because of the estoppel. Obviously, if the act of sale were spurious, the alleged vendor would not have warranted title to the property, and plaintiffs could never have assumed this obligation by accepting her succession. It was necessary for the court to decide the question of forgery only on the factual issue presented.

Certainly, they would have escaped the estoppel which the court maintained.²¹

SUCCESSION PROCEDURE. The loose manner in which many of the "accounts" filed in succession proceedings are drafted²² was again productive of litigation. In *Succession of D'Hebecourt*,²³ it was held that an annual account which listed assets considerably less in amount than that shown on the inventory, which did not list certain assets shown thereon, and which failed to explain certain of the liabilities listed, did not comply with Article 1674 of the Civil Code. A judgment vacating a provisional homologation of such account was affirmed. *Succession of Prima*²⁴ found no authority in the courts to compel an heir to advance his proportion of the succession debts under penalty of having only his interest in the succession property sold. In *Succession of Giordano*,²⁵ the court again applied the rule that the maxim "*le mort saisit le vif*" had no application to irregular heirs, and that the latter may be sent into possession of the succession only after a contradictory proceeding against the presumptive heirs. A petition for possession brought by a natural child, which showed the existence of legitimate children of the deceased who were not made parties to the proceeding, was held subject to an exception of nonjoinder of parties defendant. *Succession of Strange*²⁶ presented a contest between two creditors of the deceased to be appointed administrator of his succession. Pointing out that the courts had no discretion in the matter, and that the creditor first applying for the administration (unless otherwise disqualified) had a prior right thereto, the trial judge was directed to make the appointment accordingly. No facts sufficient to disqualify the first applicant were found in his nonresidence in the parish in which the succession was opened, and in his being administrator of the succession of the wife of the deceased even though there might be some conflict of interest between the two successions.

RECEIVERSHIP PROCEDURE. In *Sklar Oil Corporation v. Stan-*

21. By suing to recover only the grandfather's interest in the property, plaintiffs could not have been held to have accepted their grandmother's succession thereby.

22. The "account" filed in the majority of succession proceedings today confuses the respective functions of the tableau of distribution and the account, properly speaking. On this subject, see *Succession of Bofenschen*, 29 La. Ann. 711, 712-713 (1877).

23. 189 La. 319, 179 So. 440 (1938).

24. 188 La. 319, 177 So. 62 (1937).

25. 188 La. 1057, 178 So. 627 (1938).

26. 188 La. 478, 177 So. 579 (1937).

dard Oil Co. of Louisiana,²⁷ the receiver had secured an order of court, after notice to all interested parties, to sell certain property belonging to the receivership free and clear of all liens and encumbrances. The sale made pursuant to this order was duly approved and confirmed by a judgment of court. The latter was held to be *res judicata* of all actions brought by the creditors to enforce their claims against the property sold, after the lapse of one year from the date thereof. The sale of the property, however, was held subject to the claims for royalty, which were not mentioned in the order authorizing the sale. *Receivership of Manteris No. 1 Well*²⁸ applied the established rule that claims for materials furnished and services rendered to the receivership prime the claims of creditors of the partnership incurred prior to the receivership. Certain creditors also contended that their claims for the reimbursement of funds alleged to belong to them which had come into the hands of the receiver were privileged. Since these creditors had acquiesced in a court order turning such funds over to the receiver, and since these funds had become mingled with other moneys belonging to the receivership, the claims were held not privileged.

APPELLATE JURISDICTION AND PROCEDURE. A statutory provision²⁹ forbids the dismissal of appeals prosecuted to an appellate court which has no jurisdiction over the subject matter of the cause. Such appeals must be transferred to the proper tribunals. Four instances presented the question of whether the cases should be so transferred. In *H. A. Bauman, Inc. v. Tilly*,³⁰ the court again applied the rule that the amount in controversy at the time of the submission of the case to the trial court determined the appellate court to which a suit for a moneyed judgment would go on appeal. Since the primary demand for a large amount had been abandoned prior to submission to the trial court, and the only contest concerned an alternative demand for \$1,500, the cause was transferred to the proper Court of Appeal. The question of whether a claim for penalties sanctioned by statute would be included in determining the amount in controversy was presented for the first time in *Madison v. Prudential Ins. Co. of America*.³¹ The court's affirmative answer to this question—on rehearing—ap-

27. 189 La. 1049, 181 So. 487 (1938).

28. 188 La. 893, 178 So. 386 (1938).

29. La. Act 56 of 1904, § 1, as amended by La. Act 19 of 1912, § 1 [Dart's Stats. (1932) § 1427].

30. 188 La. 531, 177 So. 657 (1937), reversing *H. A. Bauman, Inc. v. Tilly*, 175 So. 489 (La. App. 1937).

31. 190 La. 103, 181 So. 871 (1938).

pears to be correct.³² The Supreme Court held that it had jurisdiction because the penalties must be included in determining the amount in dispute. In *A. M. Edwards Co. v. Hano*,³³ the court again had occasion to point out that the homestead exemption is lost irrevocably if it is not claimed prior to a judicial sale of the property under seizure. Consequently, when no such claim was urged in the trial court and the property had been sold, the Supreme Court did not have appellate jurisdiction over the cause on the theory that a homestead exemption was at issue. The case was transferred to the proper court of appeal.

In several cases motions by the appellee to dismiss the appeal were disposed of through the application of elementary principles. *D'Angelo v. Nicolosi*³⁴ applied the rule that a motion to dismiss the appeal relating only to the regularity of bringing the appeal to the appellate court, and not to appellant's right to appeal, comes too late if filed more than three days after the expiration of the period allowed for filing the transcript. Appellee moved to dismiss on the ground that the transcript was not lodged in the appellate court within the original period allowed by the order of appeal, and that an extension of time therefor had issued improvidently. Since the motion was filed later than the third day after the expiration of the extended period for filing the record, it was held to come too late. *Dent v. Dent*³⁵ was disposed of through the application of the rule that days of grace are allowed only for the original period granted to file the transcript, and not for any extended period. In *Harding v. Hackney*³⁶ the order of appeal was signed by the trial judge in chambers; since no citation of appeal was prayed for or served on the appellee, under the pertinent code provision³⁷ the appeal was dismissed. In *Mason v. Red River Lumber Co.*,³⁸ the appellee sought to dismiss the appeal on the ground that the appellant had acquiesced in the judgment (dismissing his petition because it disclosed no cause of action)

32. The subject is discussed more fully, and the same conclusion reached, in *Foundation Finance Co. v. Robbins*, 144 So. 293 (La. App. 1932). Both of these decisions are in accord with the legislative interpretation. It was thought necessary to adopt a constitutional amendment to permit the City Courts of New Orleans to entertain jurisdiction of money demands not in excess of \$300, "exclusive of penalties." Cf. La. Const. of 1921, Art. VII, § 91, prior to and after amendment pursuant to La. Act 197 of 1928.

33. 188 La. 632, 177 So. 691 (1937).

34. 188 La. 326, 177 So. 64 (1937).

35. 189 La. 888, 181 So. 435 (1938).

36. 189 La. 132, 179 So. 58 (1938).

37. Art. 573, La. Code of Practice of 1870, as amended by La. Act 49 of 1871.

38. 188 La. 686, 177 So. 801 (1937).

by thereafter filing an identical suit in the federal court. The court held that there was no acquiescence thereby in the judgment appealed from. However, it was held that the institution of the second action was an abandonment of any right of appeal in the first. In *Frost Lumber Industries v. Bryant*,³⁹ judgment was rendered against the defendants as prayed for, and only one appealed. The appellant and the plaintiff-appellee both moved to dismiss the appeal on the ground that it was abandoned. These motions were granted even though the nonappealing defendants had not consented thereto, the court holding that the latter were not concerned with the abandonment of the appeal. *Succession of Jones*⁴⁰ recognized the right of a litigant, suing *in forma pauperis*, to a suspensive appeal without bond when the dispute was over a fund in the custody of the court. Consequently, the unwarranted act of the trial judge in requiring the appellant to furnish bond in order to suspend the execution of the judgment appealed from was held not to render the appeal a devolutive one. And an administrator who distributed the succession assets in the face of such appeal was condemned individually and officially to pay the claim of the appellant which the Supreme Court recognized. *Brock v. Stassi*⁴¹ applied the commonplace rule that when the order of appeal was executed more than ten days after the signing of the judgment, any appeal taken thereby was purely a devolutive one. Appellant's prior application for supervisory writs was held not to toll the running of the ten days allowed for suing out a suspensive appeal. *State ex rel. Knighton v. Derryberry*⁴² held that an order vacating the judicial sequestration of the proceeds of oil extracted from the lands in controversy was an interlocutory order which might cause irreparable injury, and hence could be appealed from suspensively. But an order vacating a previous one requiring the defendants to account was held to be an interlocutory judgment from which no suspensive appeal could be taken because it could not cause irreparable injury.

Two cases were remanded for new trials because there were no stenographic notes of the evidence. In *Dreher v. Guaranty Bond & Finance Co.*,⁴³ the court stenographer who had reported the trial had left the state without transcribing his notes. *Williamson v. Enterprise Brick Co.*⁴⁴ held that it was the duty of the

39. 189 La. 227, 179 So. 297 (1938).

40. 189 La. 693, 180 So. 489 (1938).

41. 189 La. 88, 179 So. 44 (1938).

42. 188 La. 412, 177 So. 256 (1937).

43. 188 La. 421, 177 So. 259 (1937).

44. 190 La. 415, 182 So. 556 (1938).

clerk to take down the testimony in writing, or to have this done by a deputy or stenographer. The mere fact that plaintiff was suing *in forma pauperis* and could not pay the charges therefor was held to be no excuse for the nonperformance of this duty.

*Gautreaux v. Harang*⁴⁵ settled one question which has long been mooted by attorneys of the state. The court held that while it could grant an extension of time for filing a brief in support of an application for rehearing, it had no power to enlarge the time allowed for filing the application itself. Any "supplemental application" for rehearing, or any points urged in a brief, filed after the delay for applying for rehearing had expired, could not be noticed by the court. *Zylks v. Kaempfer*⁴⁶ filled another gap in our law of appellate procedure. The appellee died before the rendition of a judgment in her favor by the Supreme Court. Since this judgment was obviously invalid, her executors made themselves parties to the appeal and petitioned the court to render a judgment in their favor *nunc pro tunc*, otherwise identical with the original decree. Since no opposition thereto was filed by the appellant,⁴⁷ judgment was rendered accordingly.

In *Succession of Robinson*,⁴⁸ the court refused to dismiss the appeal because of a late payment of the Supreme Court filing fee, when the latter had been paid prior to argument. In *Gumbel v. New Orleans Terminal Co.*,⁴⁹ the court properly held that its decrees could not be annulled when final, on the ground that errors of law had been committed.

The Injunction Statute⁵⁰ prohibits the granting of a suspensive appeal from a judgment refusing an injunction. In *Knott v. Himel*,⁵¹ this act was held to prevent a trial judge from issuing an injunctive order *ex proprio motu* and without bond, after sustaining an exception to the plaintiff's petition and rejecting his demands. The effect was held to be the same as if the judge *a quo* had granted a suspensive appeal.

SUPERVISORY JURISDICTION AND PROCEDURE. A constitutional

45. 190 La. 1060, 183 So. 349 (1938). This case is discussed further herein, *infra*, pp. 344 and 354.

46. 190 La. 839, 183 So. 174 (1938).

47. Even if the appellant had opposed the petition, the same result should have obtained. There is no necessity for a busy appellate court to try a case anew simply because of the death of a party, unless new issues are presented thereby.

48. 188 La. 742, 178 So. 337 (1938).

49. 190 La. 904, 183 So. 212 (1938).

50. La. Act 29 of 1924 [Dart's Stats. (1932) §§ 2078-2083].

51. 189 La. 323, 179 So. 441 (1938).

provision⁵² requires the issuance of the writ of review as a matter of right whenever a decision rendered by one Court of Appeal conflicts with the jurisprudence of another or with that of the Supreme Court. This provision was invoked but once during the 1937-1938 term.⁵³ In *Rembert v. Fenner & Beane*,⁵⁴ the court held that when the intermediate appellate court had remanded a case for further trial on one particular point, the latter was not before the Supreme Court under a writ of review, since the matter had not yet been determined finally by the intermediate appellate court. *Laurent v. Unity Industrial Life Ins. Co.*⁵⁵ pointed out that the rule of court requiring an applicant for a writ of review to annex to his application certified copies of the opinion of the Court of Appeal and other portions of the record was adopted purely for the convenience of the Supreme Court. Noncompliance therewith by the applicant would not result in the recall of the writ after its issuance.

In *Cardino v. Scroggins*,⁵⁶ the defendant's prior application for supervisory writs had been denied on the ground that he had an adequate remedy by appeal. Thereafter the plaintiff sought to prevent the exercise of this remedy by reducing his claim below an appealable amount. The expedient proved unsuccessful because the Supreme Court granted defendant relief under a writ of certiorari issued to the trial court.

MISCELLANEOUS. Several cases involved procedural points which either cannot be classified conveniently, or constitute the sole decision on the subject. *Strange v. Albrecht*⁵⁷ held that it was not necessary, on the confirmation of a default, to prove the genuineness of the payee's blank endorsement of the instrument sued on. Pointing out that early cases to the contrary had been overruled by the Negotiable Instruments Law,⁵⁸ the court held the plaintiff to be a prima facie holder in due course, with the right to sue thereon in his own name.

*Bogalusa Ice Co. v. Moffett*⁵⁹ held *inter alia* that a judicial se-

52. La. Const. of 1921, Art. VII, § 11.

53. *Geddes & Moss U. & E. Co. v. First National Life Ins. Co.*, 189 La. 891, 181 So. 436 (1938), aff'g 177 So. 818 (La. App. 1938). This case is discussed further herein, *infra*, p. 411.

54. 188 La. 385, 177 So. 247 (1937), aff'g *Rembert v. Fenner & Beane*, 175 So. 116 (La. App. 1937). This case is discussed further herein, *infra*, p. 351.

55. 189 La. 426, 179 So. 586 (1938). This case is discussed further herein, *infra*, p. 410.

56. 190 La. 53, 181 So. 810 (1938).

57. 190 La. 897, 183 So. 209 (1938).

58. La. Act 64 of 1904, §§ 24, 51, 59 [Dart's Stats. (1932) §§ 813, 840, 848].

59. 188 La. 598, 177 So. 679 (1937).

questration may be issued without bond, and that movable as well as immovable property might be sequestered when necessary. The rule that a temporary restraining order will not issue without bond except in those cases where the law requires no security was again applied.

In *Liquidation of Canal Bank & Trust Co.*,⁶⁰ the plaintiff of an action pending in a federal district court brought an ancillary proceeding in the state court to compel the state bank examiner to permit an examination of the books of a defunct bank. Since the federal court had jurisdiction over the bank examiner, and could compel discovery by him, the plaintiff was denied the relief prayed for.

In 1933 the Supreme Court had held that, although the formalities and requisites of law had been complied with, an attempted partition was invalid unless such an intention was disclosed by an express use of the term "partition."⁶¹ The successful plaintiffs in this case were among the party defendants in *Rauschkolb v. Di Matteo*⁶² and they reconvened, praying that the mortgage be decreed invalid insofar as their interest in the property was concerned. They asserted that since the mortgagor had no title to the interest which they claimed, such interest was not subject to the mortgage. On the question of their ownership of the property these defendants pleaded as *res judicata* the decree of the Supreme Court in the first case, which defense the trial court had maintained. In reversing this judgment, the Supreme Court held that the mortgagee, not having been a party to the first suit, was not bound by any judgment rendered therein. But for the fact that it overruled its prior decision, the court's language in differentiating *stare decisis* and *res judicata* might have indicated an acceptance of the common law judicial technique. Finding its former decision entirely too technical, the court held that the proceeding in question was a valid partition even though it was not labeled as such.

III. CIVIL CODE AND RELATED SUBJECTS

A. FAMILY LAW

Separation from Bed and Board, and Divorce

(a) *Jurisdiction*. Three cases appear in which the plea to the jurisdiction must have been urged as a matter of last resort,

60. 188 La. 1069, 178 So. 883 (1933).

61. *Fradella v. Pumilia*, 177 La. 47, 147 So. 496 (1933).

62. 190 La. 7, 181 So. 555 (1933).

since the issues were plain and well settled. In *Gennusa v. Gennusa*¹ the wife sued in Orleans parish for divorce under Act 31 of 1932,² the four-year act. The husband pleaded *res adjudicata* and divorce in his favor in St. Bernard parish. The wife answered that she and the husband were both residents of Orleans parish when the judgment was rendered but she did not bear the burden of proving that the district court of St. Bernard was without jurisdiction to render the judgment. The records of the husband's judgment did not show the court to have been without jurisdiction, and the petition showed a notation of service accepted and signed by the wife. The wife alleged that her signature was not a waiver to submit her person to the jurisdiction; but the court held otherwise. In *Parsley v. Parsley*³ the husband submitted to the jurisdiction of a Texas court by appearing, filing answer, and defending a suit brought by his wife. The Texas divorce and order for the custody of the child was held to be entitled to full faith and credit in Louisiana under the doctrine of *Haddock v. Haddock*.⁴ In *Plitt v. Plitt*⁵ there was issued against the district judge of East Baton Rouge parish a writ of prohibition to proceed further in a suit for separation from bed and board on the ground that the court was without jurisdiction, either *ratione personae* or *materiae*, the last matrimonial domicile having been Atlanta (Georgia).

(b) *Cause*. Four cases were presented which should be a proper warning to erring wives. The decisions are sound and offer little of unusual interest but for two points, one of evidence and one of procedure. In the case of *Adranga v. Tardo*,⁶ the wife sued for separation from bed and board on the grounds of public defamation and cruelty. The husband reconvened alleging the same things plus abandonment. The husband proved to the court that the wife and her relatives "abused, cursed and nagged him" from the time of the marriage until four months later when she left, taking all of the furniture, leaving his clothes on the floor and locking the house! The judgment was for the husband. The trial judge said that the wife was "very pugnacious and bellicose!"⁷ In *Henderson v. Henderson*⁸ the wife sued for separation from bed

1. 189 La. 137, 179 So. 60 (1938).

2. Dart's Stats. (1932) § 2202.

3. 189 La. 584, 180 So. 417 (1938).

4. 201 U.S. 562, 26 S.Ct. 525, 50 L.Ed. 867 (1906).

5. 190 La. 59, 181 So. 857 (1938).

6. 189 La. 678, 180 So. 484 (1938).

7. 189 La. at 680, 180 So. at 485.

8. *Ibid.*

9. 190 La. 836, 183 So. 173 (1938).

and board, alleging cruel treatment. The spouses had three girls, aged 11, 14 and 16 years. The wife gave no notice of her decision, moved the furniture and the car to another house, filed suit against the husband and let him come home unprepared to an empty house. The wife could not prove her allegations. The husband provided well according to his means, was quiet and agreeable. The wife was said to be of a nervous and excitable temperament and of a jealous disposition. No separation was granted. In *Mouille v. Schutten*¹⁰ the wife sued for separation from bed and board on the ground of cruelty, asked for custody of the minor daughter, alimony and attorney's fees. There was a great deal of conflicting testimony. The husband proved, however, that the wife went out with men friends against his expressed wishes. This conduct was the real cause of the failure of the marriage. Separation was granted to the husband, giving him permanent custody of the child. The decision seemed wise and just. However, the admission of the testimony of one witness, while not relied upon, is subject to criticism as indicated in the dissenting opinion. A voluntary witness was allowed to testify to improper relations between himself and the wife. The dissenting justice said that "Such testimony is, in its very nature, and from the source from which it comes, utterly unworthy of belief. . . . A woman is defenseless against such testimony. . . . If such a witness does not refuse to divulge his secret, the judge ought to forbid him to divulge it. And the reason for that is that the testimony would be utterly worthless as evidence."¹¹ In *Landry v. Regira*¹² the wife sued for separation on the ground of cruel treatment, asked for custody of the children, alimony *pendente lite*, judicial sequestration of community property, and attorney's fees. The husband made a reconventional demand for absolute divorce on the grounds of adultery, which was proven. The husband was granted the divorce and given the custody of the children. The court said that the reconventional demand was connected with and incidental to the main demand. The abandonment cases were distinguished. No alimony was granted to the wife except *pendente lite* and a sum of the community property given her by the husband on parting was held enough to cover that. The major importance of this case lies in the procedural point involved which is discussed under the appropriate heading.¹³

10. 190 La. 841, 183 So. 191 (1938).

11. 190 La. at 869-870, 183 So. at 200.

12. 188 La. 950, 178 So. 502 (1938).

13. *Supra* p. 320.

(c) *Alimony*. These cases are of more than usual importance as several of them raise issues of peculiar social interest. *Gantz v. Wagner*¹⁴ presented the case of an absolute divorce granted the wife in 1932. Subsequently, she obtained a rule against the husband directing him to show cause why she should not have alimony, and the rule was made absolute fixing alimony at \$40.00 per month. The present proceeding was on a rule to show cause why the husband should not be adjudged in contempt for failure to pay certain installments and further, to increase the alimony to \$60.00 per month. It was alleged that the wife and 14-year old daughter were in necessitous circumstances and that \$40.00 per month was not enough. The husband was a city fireman, making \$136.00 per month, and had to pay \$10.00 per month from his salary to the Firemen's Retirement Fund. He had remarried and his second wife was a maid at the Charity Hospital earning \$30.00 per month, the same amount that she had received before her marriage. The court stated that under Article 160 of the Civil Code the maximum of \$42.00 per month should be allowed for the divorced wife. The child was entitled to an extra sum, so \$50.00 was awarded *in toto*. The court arrived at this sum by adding the husband's earnings of \$125.00 a month to the second wife's earnings of \$30.00 per month, equaling \$155.00. They concluded that \$105.00 was enough to support the husband and his second wife. The economic and social aspects of a situation wherein the earnings of a second wife are included in order to compute the alimony award for a divorced wife are worthy of very serious consideration. In *Hulett v. Gilbert*¹⁵ an award of \$75.00 per month to a wife was held fair, when the husband's salary was \$300.00 per month. The court stated that when a trial judge acts fairly and without abuse, his judgment for alimony is not ordinarily interfered with on appeal. In *Pitre v. Burlett*¹⁶ suit for divorce was brought by the husband under the four-year act,¹⁷ the parties having lived separate and apart for over 20 years. The wife left the domicile because of alleged unfaithfulness of the husband. The latter was not proved to the court's satisfaction though there was much testimony on the subject because of the claim for alimony by the wife under Act 27 of 1934 (2 E.S.),¹⁸ permitting the granting of alimony in such a case when "the wife has not been

14. 188 La. 833, 178 So. 367 (1938).

15. 189 La. 877, 181 So. 431 (1938).

16. 190 La. 127, 182 So. 123 (1938).

17. La. Act 31 of 1932 [Dart's Stats. (1932) § 2202].

18. Art. 160, La. Civil Code of 1870, as last amended by La. Act 26 of 1934 (2 E.S.).

at fault." The court held that the wife was "not without fault" and hence awarded no alimony. Undoubtedly the statute permitting alimony in these cases serves a useful and just purpose, but it is most unfortunate that under the interpretation of the word "fault" it becomes necessary to wash all of the dirty domestic linen, a process otherwise obviated by the 7-year, 4-year, and 2-year acts.¹⁹ Since these acts apparently contemplate what in reality might be a separation by mutual consent, to demonstrate actual fault or absence of fault on the part of the wife may be most difficult as well as sociably undesirable. Another case interpreting the same clause is now before the Supreme Court and it is hoped that the judicial art will mold a more favorable social process out of this well-intended act. In *Cotton v. Wright*²⁰ the wife procured a judgment for separation from bed and board for cruelty and excesses admitted by the husband. There was a reconciliation, another suit, and prayer for \$200.00 per month alimony. From a judgment for separation and alimony of \$19.85, the husband took a suspensive appeal. It was held that the husband had to pay alimony *pendente lite* whatever the merits of the case, as a husband has to support his wife as long as the marriage lasts. In *Wright v. Wright*²¹ it was held that the prescription of ten years under Article 3547 of the Civil Code does not apply to an alimony judgment in favor of minor children against the father. It was very properly stated that not a debt, but a duty, exists in this situation and, hence, the judgment was not founded on debt, but was to enforce a "continuing legal duty." In *Glaser v. Doescher*²² the wife obtained a separation from bed and board on January 16, 1933, with a \$45.00 per month alimony award. The sum was reduced to \$40.00 on May 2, 1934. Final divorce and \$40.00 a month alimony were granted on February 26, 1937. On March 2, 1937 a rule to reduce the alimony to \$20.00 per month was upheld by the Supreme Court. The child had come of age but was giving the wife no support and she had no property or income. The husband's income was hard to determine, but apparently more than \$30.00 per month. He operated a little grocery store, employed help, and ran a small truck in connection with his business. In *Reichert v. Lloveras*²³ the wife brought suit for separation from bed and board for causes arising subsequent to a reconciliation

19. La. Acts 269 of 1916 (7 years), 31 of 1932 (4 years), 430 of 1938 (2 years), [Dart's Stats. (1932) § 2202].

20. 189 La. 686, 180 So. 487 (1938).

21. 189 La. 539, 179 So. 866 (1938).

22. 189 La. 518, 179 So. 840 (1938).

23. 188 La. 447, 177 So. 569 (1937).

after a judgment for separation from bed and board nearly ten years before. The wife also prayed for alimony *pendente lite*. The court held that the wife had a right to this type of alimony award. As an incident to the controversy, the court had occasion to mention that a property settlement from the original judgment for separation from bed and board stands as the sole remainder of that judgment under Louisiana jurisprudence. This principle seems incongruous, illogical and unfair, both as a legal principle and as a social doctrine in the best interests of the family.²⁴ In the case of *Snow v. Snow*²⁵ the court refused to modify a judgment for past due alimony because, under Article 548 of the Code of Practice, it becomes the *property* of the one in whose favor it has been granted. An interesting question is suggested by the discussion in regard to the personal nature of an alimony judgment and its validity under the full faith and credit clause of the United States Constitution, when substituted service has been used in the divorce proceedings.

(d) *Property Settlement after Divorce.* In *Rhodes v. Rhodes*²⁶ a wife obtained a judgment of divorce against her husband, decreeing a dissolution of the community and a partition of property. The judgment did not fix the manner in which the partition should be made. The present suit was filed by the wife with a view to partitioning the community by licitation and receiving an accounting from the husband. One of the contentions of the defendant was that the property could not be partitioned because of a mortgage. The court ruled that this defense was entirely without merit because of the specific provision of Article 1338 of the Civil Code. The husband further contended that because of the insolvency of the community, there could be no partition until a liquidation of the debts had been effected. This contention was also held to be invalid under the settled jurisprudence. Finally, the husband contended that since the wife accepted the community with benefit of inventory, she renounced the debts and, hence, had no interest or right to a partition by licitation. The court very properly stated that on the contrary, under Act 4 of 1882,²⁷ she does not repudiate the debts, but simply limits them to her one-half of the community property, thus relieving her from any personal liability beyond her community interest. The husband and wife became co-owners of the community property by virtue of

24. For a full discussion, see Comment, *infra* p. 422.

25. 188 La. 660, 177 So. 793 (1937).

26. 190 La. 370, 182 So. 541 (1938).

27. Dart's Stats. (1932) § 2213.

the dissolution of the marriage by divorce and either had a perfect right to a partition.

Annulment of Marriage

In *Rhodes v. Miller*²⁸ the husband secured a judgment by default for annulment of his second marriage. The second wife here-in appealed devolutively, the delay for suspensive appeal having lapsed. The husband alleged that he married his second wife after she had been named as corespondent in his first wife's successful divorce suit for cause of adultery. The husband and his second wife were married in Chicago in order to avoid the effect of Article 161 of the Civil Code.²⁹ The second wife alleged that the husband could not plead his own turpitude; that he had not come into court with "clean hands"; that causes for annulment are specific and exclusive in Articles 110-118, and that this is not one of them, citing *Ryals v. Ryals*,³⁰ where annulment was refused when insanity was pleaded. The court stated that the decision on insanity was correct but that Article 161 does give a right to annul when coupled with Articles 93 and 113.³¹ While the husband's hands were not clean, an estoppel could not be invoked to impair the force and effect of a prohibitory law. The marriage was annulled. The court stated that it was "not acting for the sake of the party, but for the public good."³² There were apparently no children. Article 161 was taken from an article of the French

28. 189 La. 288, 179 So. 430 (1938).

29. Art. 161, La. Civil Code of 1870: "In case of divorce, on account of adultery, the guilty party can never contract matrimony with his or her accomplice in adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy, and under the penalty of nullity of the new marriage."

30. 130 La. 244, 57 So. 904 (1912).

31. Art. 93, La. Civil Code of 1870: "Persons legally married are, until a dissolution of marriage, incapable of contracting another, under the penalties established by the laws of this State."

Art. 113, La. Civil Code of 1870, as amended by La. Act. 426 of 1938: "Every marriage contracted under the other incapacities or nullities enumerated in the second chapter of this title may be impeached either by the married persons themselves, or by the person interested, or by the Attorney-General; however, marriages heretofore contracted between persons related within the prohibited degrees, either or both of whom were then or afterwards domiciled in this State, and were prohibited from intermarrying here, shall nevertheless be deemed valid in this State, where such marriages were celebrated in other States or countries under the laws of which they were not prohibited; but marriages hereafter contracted between persons, either or both of whom were domiciled in this State and are forbidden to intermarry shall not be deemed valid in this State, because contracted in another State or country where such marriages are not prohibited, if the parties after such marriage return to reside permanently in this State."

32. 189 La. at 300, 179 So. at 433 (1938).

Civil Code which was repealed in 1904.³³ The associated rule refusing to permit legitimation by marriage of adulterous illegitimate children has also been dropped in France.³⁴ It seems unfortunate and socially unprogressive to enforce the letter of Article 161, especially in favor of an admittedly guilty plaintiff, unless there was no method of circumventing the statute. It would have been simple enough in this situation to have refused annulment just as the earlier decisions softened the harsh letter of the law by insisting (although not specified in the article) that the correspondent must be named in the divorce proceeding, thus effecting a wiser and more progressive social policy. The present court could have followed suit in further emasculating an outworn statute. In the same year, 1938, the court in *Succession of Elmer*,³⁵ upheld but for the *légitime*, a testamentary gift by a husband to his second wife of the whole of his estate despite the plea of his children that the donee had lived in open concubinage with their father prior to his first wife's (their mother's) death, citing the exception of Article 1481 in favor of those who afterwards marry.³⁶ These children would doubtless not be impressed with the high moral tone of the reasoning upon which the nullity of the marriage in the instant case was placed. The distrust of the law by the laity is easily understood when the confusion and contradiction of social policy evidenced are noted.

Husband and Wife

In *D. H. Holmes Co., Ltd. v. Morris and his wife*,³⁷ suit was brought on open account for purchases made by the wife in her own name without her husband's knowledge, and while she was living separate and apart from him. She bought a wrist watch for \$150.00, a watch band for \$100.00, five items of clothing totaling \$22.09 and two lunches totaling \$1.15. Judgment *in solido* was asked for against the husband and wife. There was no appeal from the judgment of the lower court for the clothing and lunches.

33. Art. 298, French Civil Code, repealed by Law of Dec. 15th, 1904.

34. Art. 331, French Civil Code, as amended by Laws of Nov. 7th, 1907, Dec. 30th, 1915, and April 25th, 1924, "make(s) provision for the legitimation of adulterine children on the marriage of their parents if they have been acknowledged by the parents before, or at the time of such marriage." Renton, *The Retouchement of the Code Civil* (1933) 20 Va. L. Rev. 188, 189.

35. 189 La. 1016, 181 So. 477 (1938).

36. Art. 1481, La. Civil Code of 1870: "Those who have lived together in open concubinage are respectively incapable of making to each other, whether *inter vivos* or *mortis causa*, any donation of immovables; and if they make a donation of movables, it can not exceed one-tenth part of the whole value of their estate.

"Those who afterwards marry are excepted from this rule."

37. 188 La. 431, 177 So. 417 (1937).

The Supreme Court gave judgment against the wife for the watch and band. The parties were living separate and apart by common consent and the husband was furnishing the wife with \$25.00 per month. On the facts, the decision seemed fair, so far as property law is concerned, and definitely in line with the statutes making a distinction between the phrases "when living apart"³⁸ and "living separate and apart . . . by reason of fault."³⁹ Since the wife's earnings in a separate occupation would in this situation be her separate property according to the distinction made in *Houghton v. Hall*⁴⁰ and *Byrd v. Babin*,⁴¹ certainly the community should not be bound by debts contracted by her. It is doubtful if the husband, under this set of facts, should have been held for the clothing and lunches though that was a matter of his individual liability to support the wife during the existence of the marriage. The latter question was not before the Supreme Court. In *Shannon v. Shannon*⁴² the wife tried to upset a contract with the husband made when the spouses were contemplating judicial separation. She pointed out that she only got one-half of the community rightfully hers, and received nothing for her alimony rights, and hence that the contract was without consideration. There was no charge of fraud or error. The decision was on contract law and pleadings and stated that she could not change the instrument by her own proof without an allegation of fraud or error. The contract between the husband and wife was admitted with no reference to the Acts of 1926 or 1928.⁴³ The analysis on contract statutes made no reference to the particular laws of husband and wife. The soundness of the decision is questionable even on pure contract grounds, as the jurisprudence admits proof of lack of consideration. The Chief Justice dissented, stating that it was not necessary to plead the prohibitory law under Act 34 of 1902⁴⁴ providing that the husband must support the wife. The fact that this was his responsibility was a matter of public policy. In the Chief Justice's opinion the contract was null on its face.

38. Art. 2334 (par. 3), La. Civil Code of 1870, as amended by La. Act 170 of 1912.

39. Art. 2334 (par. 4), La. Civil of Code of 1870, as amended by La. Act. 186 of 1920.

40. 177 La. 237, 148 So. 37 (1933).

41. 181 La. 466, 159 So. 718 (1935).

42. 188 La. 588, 177 So. 676 (1937).

43. La. Acts 132 of 1926 and 283 of 1928 [Dart's Stats. (1932) §§ 2169-2173]. These are the two latest so-called married women's emancipatory acts.

44. Dart's Crim. Stats. (1932) Art. 927.

Tutorship and Emancipation

In *Caskey v. United States Fidelity & Guaranty Co.*⁴⁵ the bondsman of a natural tutor, father of minors, was held for the unpaid price of property adjudicated to the father. The theory of the decision was that a failure to record an adjudication which would have operated as a legal mortgage was an act of maladministration. In *Webster's Tutorship*⁴⁶ the mother was made natural tutrix of a minor child. She later asked to be relieved of her duties and at her request, a bank was made tutor of the finances of the minor and the mother given the custody of the person. Subsequent to these appointments, the mother consented to the minor's emancipation, and the court emancipated him. The bank refused to turn over his property to him, contending that it had not been properly discharged. The court so held. It was stated that the bank was in reality the tutor under Act 45 of 1902.⁴⁷ The mother simply had care of the person of the minor and was not even a co-tutor, so the bank was not discharged by the emancipation proceedings (to which it had not consented) and consequently did not have to turn over the estate of \$11,000 or more to the minor.

Interdiction

The *Interdiction of Scurto*⁴⁸ again instances the wisdom of the court in refusing to affirm a judgment of interdiction. A father and two brothers were attempting to secure the interdiction of a young woman, and the interdiction was granted apparently because she refused to answer questions on trial. The girl trusted only her sister, who was not a party to any of the proceedings. Two medical experts appointed by the court found the young woman sane and able to care for her person and property.

Duty of Support

The case of *Steib v. Owens*⁴⁹ presents an action by an aged mother to recover alimony from her three sons. Two of the defendants rightly excepted to the jurisdiction of the court *ratione personae*. The third son averred that he had offered his mother \$7.00 per month, or a living with him, which she refused because of the smallness of the sum and incompatibility with her son's

45. 190 La. 997, 183 So. 242 (1938).

46. 188 La. 623, 177 So. 688 (1937).

47. La. Act 45 of 1902, § 1(6) [Dart's Stats. (1932) § 582(6)].

48. 188 La. 459, 177 So. 573 (1937).

49. 190 La. 517, 182 So. 660 (1938).

wife. The lower court awarded \$5.00 per month. The Supreme Court raised the sum to \$10.00 per month and stated that the son could not compel the mother to reside with him and his wife against her wishes. The two sons, without the jurisdiction, were sending the mother \$10.00 a month each.

B. CONVENTIONAL OBLIGATIONS

Although no cases of any great moment dealing with the general law of contract were presented to the Supreme Court during the sessions being considered, not without importance was the case of *Baucum & Kimball v. Garrett Mercantile Co.*⁵⁰ There a seller of cotton defended an action for the recovery of a portion of the purchase price on the ground that the transaction was a wager. Several sales "on call" were made, the seller delivering the cotton to the buyer and the buyer advancing to the seller the future price listed for a future month agreed upon, less an agreed number of points off such price and a fixed additional amount per bale. Under the contract the seller could then "call" the price at any time prior to the agreed date. If the price of cotton had increased at the time the price was called, the seller profited by the difference, and if it had declined, the difference between the amount received and the then market price was to be repaid to the buyer. If the transaction had not been closed out in this fashion before the agreed date it could then be closed by the buyer with the necessary adjustment in price being made. However, if the future price for the month agreed upon increased before the agreed date the buyer would be obliged to pay to the seller an additional amount to cover the increase, and if, in the meantime, it declined the seller would be obliged to make a refund to the buyer to protect his margin. Finally, the seller might prevent the buyer's closing out the contract at the agreed date by paying the buyer an additional commission for transferring the contracts to a future date then to be agreed upon. The facts disclosed that seven transactions of this nature had occurred between the parties beginning in the year 1931 and that in each case the contracts had been transferred to May, 1935. In March, 1935, the price of cotton having declined severely, the buyer called on the seller for additional margin. The seller failed to respond and the buyer exercised the privilege of calling the price, thereby closing out the contract. The buyer then sued to recover the dif-

50. 188 La. 728, 178 So. 256 (1938).

ference due him. The court found none of the elements of a bet or wager but that the contract involved merely a present sale and delivery of cotton with the price ultimately to be paid to depend upon the market quotations on the agreed future date. It did not mention two contrary Texas cases which had been relied upon by the Court of Appeals, and felt that actual delivery of the cotton prevented the transaction from constituting merely a gamble on the future price of cotton. In view of the seller's ability to transfer the contracts at the expiration of the time originally agreed upon to a future date by paying an additional commission, the transactions in question seem to have gone beyond the simple sales at a price to be determined in the future which the Texas courts found invalid. Taken alone this portion of the transaction seems to constitute a mere wager. Legal support for it must therefore be found in the original "delivery." The result of the case seems to be that a single delivery could serve as a basis for future indefinite speculation based on the periodical payment of a "commission" to the buyer. Since "delivery" is treated as significant because it is considered as indicating that the parties are not merely gambling on the rise or fall of prices, the instant case seems to stretch its legal effect to the breaking point.⁵¹ That the court did not consider this aspect of the case is to be regretted.

In *Crowell and Spencer Lumber Co. v. Hawkins*,⁵² an action to recover for a deficiency in acreage, the court properly rejected a defense grounded on the theory that there was mutual error concerning the extent of the subject matter of the contract and that it should be reformed to express the true intent of the parties. Only the testimony of the vendor was offered to sustain the defense and this evidence was found insufficient to establish mutual error. Since the land was not of uniform value the court determined the amount to be recovered by accepting expert testimony concerning the value of the acreage in question at the time of the sale.

*Bauman v. Michel*⁵³ permitted a buyer to recover a ten per cent deposit from a real estate agent when the owner was unable

51. See *Conner & Hare v. Robertson*, 37 La. Ann. 814 (1885); *Standard Milling Co. v. Flower*, 46 La. Ann. 315, 15 So. 16 (1894); *Stewart Bros. v. Beeson*, 177 La. 543, 148 So. 703 (1933), cited by the court. Cf. *Burney v. Blanks*, 136 S.W. 806 (Tex. Civ. App. 1911), and *Wolfe v. Andrews*, 192 S.W. 266 (Tex. Civ. App. 1917), both of which were relied on by the Circuit Court in pronouncing the contract illegal, and *H. Seay & Co. v. Moore*, 261 S.W. 1013 (Tex. Comm. App. 1924).

52. 189 La. 18, 179 So. 21 (1938).

53. 190 La. 1, 181 So. 549 (1938).

to make title to the property as a consequence of his wife's declaration of a family home in keeping with Act 35 of 1921 (E.S.).⁵⁴ Although specific performance was prayed for in the alternative this was impossible by virtue of the wife's action. The buyer's attempt to show a solidary obligation between owner and agent for the return of the deposit failed under the provision of the agreement making the broker a depositary and in the absence of any provision imposing a solidary duty. Here the court relied on Article 2093 of the Civil Code which provides that an obligation *in solido* is never presumed.

The court concluded in *Williams v. De Soto Bank & Trust Co.*⁵⁵ that a reservation of right contained in a release given to one solidary judgment debtor upon a settlement of the claim against him, pending appeal from the decision of the lower court sustaining the exceptions of other defendant debtors, was sufficient to prevent a release of the other debtors *in solido*, notwithstanding that the creditor did not reserve its rights against the latter in the motion to dismiss the suit against the first debtor, after the previously mentioned compromise. In reaching this conclusion the court followed a rule now well settled by the cases that form is not sacramental in making such a reservation.

The principle that one cannot accept the benefit of a contract and then set up its unenforceability on the ground that it should have been in writing was applied in *Burk v. Livingston Parish School Board*,⁵⁶ where the plaintiff was seeking to recover for services as an architect rendered the Board. Earlier Louisiana cases were cited along with Articles 1816, 1965, and 2272 of the Civil Code.

An attempt by a subsequent creditor to have a sale from a father to his daughter declared a simulation failed in *Eureka Homestead Society v. Baccich*⁵⁷ on the defendant's showing an actual consideration for the transfer. The court declared that where a real consideration is shown its inadequacy is not open to question, but this expression perhaps does not mean that if the consideration given is not "serious" the transaction may not be attacked as a simulation.

In *Primus v. Feazel*⁵⁸ the plaintiffs sought to recover damages or the rental value of certain oil lands on the theory that

54. Dart's Stats. (1932) § 3806.

55. 189 La. 246, 179 So. 303 (1938).

56. 190 La. 504, 182 So. 656 (1938).

57. 190 La. 494, 182 So. 653 (1938).

58. 189 La. 932, 181 So. 449 (1938).

there had been a wrongful recordation of an oil and gas lease which was being held in escrow pending examination and approval of title. The court found that no damage had been sustained by the plaintiffs as a consequence of the recordation and that plaintiffs were not justified in attempting to ratify so as to recover the stipulated rental inasmuch as they had previously filed a repudiation of the lease.

Andrus v. Eunice Band Mill Co.,⁵⁹ a suit to recover a balance claimed on a timber contract, was decided against the plaintiff for lack of proof that any amount was owing.

An effort by a lessor to secure specific performance of an oil and gas lease and at the same time to have the court declare the lease forfeited, on the ground that defendant had failed to make a payment which fell due while the case was in litigation, failed in *Slaughter v. Watson*.⁶⁰ The court felt that the lessor's attempt to have the lease forfeited was inconsistent with his allegation that he was ready, able, and willing to deliver the lease.

C. PARTICULAR CONTRACTS

Sales

The extensive oil development throughout Louisiana continues to increase the normal volume of litigation involving the validity of land titles. The result has been that a variety of problems calling into application principles of the law of sales were presented to the Supreme Court for consideration during last term. *Gautreaux v. Harang*⁶¹ has caused widespread comment and attention. A notarial act in the usual form of a cash sale but containing the additional declaration that "this sale is made to secure a debt on said described property and that no Revenue Stamps are to be attached hereto," was construed to be a pledge of immovable property or the contract of antichresis.⁶² In answer to defendant's contention that the transaction was intended to be a cash sale and not antichresis, the court held that because the instrument showed patently on its face that it was "to secure a debt on said described property" a contract of pledge resulted. Parol evidence was, therefore, not admissible to show a contrary intention. Article 3179 of the Civil Code provides:

"The creditor does not become owner of the pledged im-

59. 190 La. 141, 182 So. 127 (1938).

60. 190 La. 331, 182 So. 529 (1938).

61. 190 La. 1060, 183 So. 349 (1938). See Comment (1938) 13 Tulane L. Rev.

131.

62. Arts. 3133-3135, 3152, 3176-3181, La. Civil Code of 1870.

movable by failure of payment at the stated time; any clause to the contrary is null, and in this case it is only lawful for him to sue his debtor before the court in order to obtain sentence against him, and to cause the objects which have been put in his hands in pledge to be seized and sold."

Since defendant had not complied with this provision plaintiff's unencumbered ownership of the property was recognized by the court. The criticism that the *Harang* case has evoked does not appear justified in the light of the authorities relied on by the court.⁶³ It would seem that the important consideration here involved was not what the parties intended but—What did they actually do? Under the parol evidence rule the unambiguous clause in the act justified the result reached but it is unfortunate that the instant decision will call into question the validity of numerous titles in which similar clauses have been inserted. *Conklin v. Caffall*⁶⁴ involved a distinction between an option to purchase and a contract of antichresis. The owners of a piece of property entered into an agreement with a second party whereby the former promised to transfer title if they were reimbursed the amount of certain existing indebtedness against the property within a period of three years. This was held to create an option to purchase within three years within the meaning of Article 2462 of the Civil Code. This could not be the contract of antichresis, the court held, because no relation of debtor and creditor existed between the parties to the agreement. It is essential to antichresis that the pledgor be debtor of the pledgee.⁶⁵ It was further decided that an extension of the three year option period could not be proved by parol evidence.⁶⁶

In *Arkansas Improvement Co. v. Kansas City Southern Ry. Co.*,⁶⁷ the question raised was whether a certain act of sale amounted to a conveyance of title in full ownership or whether it purported merely to create a right of passage or servitude. The act (in the form of a common law deed with typical common law terminology) recited that the land had been "Remised, Released, and Quitclaimed" to the defendant Railway Company "for additional

63. Cf. *Calderwood v. Calderwood*, 23 La. Ann. 658 (1871). A problem analogous to the *Harang* case is to be found in the decisions construing a *vente à réméré* to be a mortgage or pignorative contract: *Latiolais v. Breaux*, 154 La. 1006, 98 So. 620 (1924) and see particularly, *Provosty, J.*, dissenting in *Marbury v. Colbert*, 105 La. 467, 29 So. 871 (1901).

64. 189 La. 301, 179 So. 434 (1938).

65. Arts. 3176-3179, 3181, La. Civil Code of 1870.

66. Arts. 2275, 2276, 2462, La. Civil Code of 1870.

67. 189 La. 921, 181 So. 445 (1938).

right of way" and "for railroad purposes, forever." Such language was held not to limit the conveyance to a mere servitude. Since the intention of the parties did not clearly appear from the language of the instrument as a whole, the court resorted to extrinsic evidence showing that the vendors had abandoned the property and had failed to exercise rights of ownership for more than thirty years. While the expression "right of way" may be either a title in fee simple or a servitude (right of passage), the factors here present (for example, failure to pay taxes since the sale) indicated very strongly that the vendor "intended the grant to be one in fee and not merely one of servitude."⁶⁸ It should be noted that the question of adequacy of consideration raised in plaintiff's amended petition was not before the court for decision.⁶⁹

One of the recent cases involving title to a portion of the Rodessa oil field was *Jackson v. Spearman*,⁷⁰ which presented for construction a notarial deed. The deed recited the appearance of "Hannah Jackson, wife of Thomas Jackson" as vendor, and also contained the following statement:

his
"I authorize *my wife* to sign the above. Thos. x Jackson."
mark

Through clerical error, the notary in taking the vendor's signature by mark, inserted

her
"Hanah x Johnson" instead of "Hannah Jackson." It was held
mark

that this error, patent on the face of the act of sale, was not such a "defect of form" as would make the instrument a "private writing" instead of an authentic act.⁷¹ Consequently, as an authentic act the instrument was full proof of the agreement it evidenced.⁷² The fact that two reputable witnesses had signed the notarial sale sufficed to make it an authentic act and additional names affixed as witnesses were properly disregarded as surplusage.

Under the articles of the Civil Code, sales and contracts relating to immovable property do not affect third persons unless recorded in the manner provided by law.⁷³ From these provisions

68. Cf. *Noel Estate, Inc. v. Kansas City Southern & Gulf Ry. Co.*, 187 La. 717, 175 So. 468 (1937); *Bond v. T.&P. Ry. Co.*, 181 La. 763, 160 So. 406 (1935).

69. See *Noel Estate, Inc. v. K.C.S.&G. Ry. Co.*, 187 La. 717, 175 So. 468 (1937) (recital of \$1.00 consideration held inconsistent with an intention to convey full ownership of tract of land).

70. 188 La. 535, 177 So. 658 (1937).

71. See Art. 2235, La. Civil Code of 1870.

72. Arts. 2234, 2236, La. Civil Code of 1870.

73. Arts. 2246, 2264, 2266 and 2442, La. Civil Code of 1870.

it follows that one who purchases in reliance on the public records is protected.⁷⁴ *Jefferson v. Childers*⁷⁵ was decided in accordance with the above principles and the lessee of an oil and gas lease, obtained by a duly recorded cash deed from the record owner appearing to have a good title, was protected against a vendor who asserted the right to impeach the prior sale for fraud and non-payment of the recited cash consideration.⁷⁶ In *Porterfield v. Parker*,⁷⁷ immovable property belonging to the community between plaintiffs' mother and stepfather was sold by the latter as head and master of the community. The act of sale was not recorded until after the death of plaintiffs' mother. It was held that such failure to record did not entitle the plaintiffs as heirs of their mother to recover an interest in the property since they were not "third parties" within the meaning of the codal article requiring recordation,⁷⁸ and the sale by their stepfather during the community operated to divest their mother's interest in the property.⁷⁹ Consequently there was nothing to pass to the plaintiffs as heirs.

The validity of a building restriction contained in an act of sale forbidding the use of the real property for commercial purposes and placing a minimum value upon residential construction was sustained in *Ouachita Home Site & Realty Co. v. Collie*.⁸⁰ The defendant in injunction proceedings, charged with violation of the restrictions, contended that the covenant would serve "to take property out of commerce perpetually, and to create a tenure of property unknown to our law." Relying upon the two leading Louisiana cases upholding similar restrictions⁸¹ the court drew a distinction between the attempt perpetually to restrain the alienability of property⁸² and "contracts for the use or nonuse of real

74. *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (1910) (actual knowledge not equivalent to registry).

75. 189 La. 46, 179 So. 30 (1938).

76. The instant principle must not be confused with the right of an unpaid vendor to resolve a credit sale, appearing on the public records to be such, for non-payment of the purchase price. Art. 2561, La. Civil Code of 1870. Cf. *Johnson v. Bloodworth*, 12 La. Ann. 699 (1857); *Templeman v. Pegues*, 24 La. Ann. 537 (1872); *Stevenson v. Brown*, 32 La. Ann. 461 (1880); *Ragsdale v. Ragsdale*, 105 La. 405, 29 So. 906 (1911); and *Schwing Lumber & Shingle Co. v. Arkansas Natural Gas Co.*, 166 La. 201, 116 So. 851 (1928).

77. 189 La. 720, 180 So. 498 (1938).

78. Art. 2442, La. Civil Code of 1870.

79. Art. 2404, La. Civil Code of 1870.

80. 189 La. 521, 179 So. 841 (1938).

81. *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (1915); *Hill v. Ross, Inc.*, 166 La. 581, 117 So. 725 (1928).

82. As in *Female Orphan Society v. Young Men's Christian Association*, 119 La. 278, 44 So. 15 (1907).

estate." Such restrictions on the use of real property are to be "likened to servitudes" under the provisions of Articles 709 and 728 of the Louisiana Civil Code and are properly enforceable by injunction.⁸³

Article 2652 of the Civil Code permits a person against whom a litigious right has been transferred to obtain a release from the litigation "by paying to the transferee the real price of the transfer together with interest from its date." According to Article 2653 "a right is said to be litigious, whenever there exists a suit and contestation on the same." In *Smith v. Cook*,⁸⁴ while their action to establish title to real estate was pending in the Supreme Court, all the plaintiffs transferred certain mineral rights and one of the plaintiffs sold all his title and interest to the land in controversy. In an excellent opinion on rehearing, the court granted the defendant's motion to remand the case so as to permit him to avail himself of the provisions of Article 2652. The case establishes the rule that a defendant against whom only a portion of the thing in litigation has been transferred may invoke the codal provision and that the proper procedure when the transfer is effected pending appeal is by motion to remand.⁸⁵

Article 2557 of the Civil Code gives to the buyer, when he is disquieted in his possession or when he has just reason to apprehend that he will be disturbed, a right to suspend payment of the price. By exception, he is denied this protection when he was informed of the danger of eviction before the sale. In *Culver v. Culver*,⁸⁶ pursuant to a judgment ordering a partition by licitation, property was adjudicated to a purchaser at a partition sale. During the pendency of the partition suit, the parties thereto had executed mineral leases and had conveyed the mineral rights to various transferees. These facts, through constructive knowledge of his agent, were known to the purchaser prior to adjudication. In this suit brought by the adjudicatee to recover the purchase money and to enjoin its distribution on the ground that the title

83. La. Act 326 of 1938 establishes a prescriptive period of two years from the commission of a violation of restrictions in title to real estate. For a discussion of this statute see Hebert and Lazarus, *The Louisiana Legislation of 1938* (1938) 1 LOUISIANA LAW REVIEW 80, 112-114.

84. 189 La. 632, 180 So. 469 (1938).

85. *Langston v. Shaw*, 147 La. 644, 85 So. 624 (1920). It would seem that the motion to remand is imperative in this situation because after judgment the party cast could not invoke Article 2652. See *Cucullu v. Hernandez*, 103 U.S. 105, 26 L.Ed. 322 (1880) and authorities therein cited. But for an analogous case in which the motion to remand was improperly refused, see *Gulf Refining Co. v. Glassell*, 185 La. 143, 168 So. 755 (1936).

86. 188 La. 716, 178 So. 252 (1938).

was defective by virtue of the mineral leases, it was held that the purchaser was not entitled to a return of the purchase price paid since he was apprised of the adverse claims at the time of the purchase. The claimants to the mineral rights were not before the court and since it did not appear that the adjudicatee had yet been dispossessed by litigation, the instant case very properly applied Article 2557. The decision is in accord with earlier authorities.⁸⁷

Lease

(a) *Immovable Property.* In *Williams v. James*,⁸⁸ the lessor of a filling station claimed an error in the description of a piece of property that had been leased and refused to deliver it. On the facts, this refusal was held not justified since there was no mistake in the thing intended and the property was easily identified. In rendering judgment for specific performance in favor of the plaintiff the court held that the term of the lease would be extended so as to begin with the date on which the lessee was permitted to take possession of the premises. This latter decision was based upon analogy to extensions granted under oil and gas leases.⁸⁹ Another filling station lease, involved in *Noel Estate, Inc. v. Louisiana Oil Refining Corporation*,⁹⁰ stipulated for a term of five years "or as long thereafter as may be required to sell such quantities of gasoline and oils, which at the rate of one cent (1c) per gallon for gasoline and fifteen cents (15c) per gallon for oils would pay to the lessee the sum of Five Thousand (\$5,000) Dollars."⁹¹ Almost nine years after the lease was executed the plaintiff (lessor) sued to cancel the contract alleging abandonment of the leased premises. Defendant's exception of no cause of action, based on plaintiff's failure to put defendant in default, was overruled in the Supreme Court. It was held that the quoted clause in the lease impliedly imposed a duty on the part of the lessee to use and occupy the property until \$5,000.00 should be realized from the sale of gasoline and oils. The abandonment of the prem-

87. *Bemiss v. Dwight*, 3 La. Ann. 337 (1848); *Bonnecaze v. Grannery*, 5 La. Ann. 166 (1850); *Municipality No. One v. Cordeville & Lacroix*, 19 La. 235 (1841); *Bayley v. Denny*, 26 La. Ann. 255 (1874). But cf. *Jennings-Heywood Oil Syndicate v. Home Oil & Development Co.*, 113 La. 383, 37 So. 1 (1904).

88. 188 La. 884, 178 So. 384 (1938).

89. Cf. *Gulf Refining Co. v. Hayne*, 148 La. 340, 86 So. 891 (1921); *Standard Oil Co. of La. v. Webb*, 149 La. 245, 88 So. 808 (1921); *Fomby v. Columbia County Development Co.*, 155 La. 705, 99 So. 537 (1924).

90. 188 La. 45, 175 So. 744 (1937).

91. 188 La. at 46-47, 175 So. at 745.

ises under these conditions constituted an active breach of the contract and therefore a putting in default was unnecessary.⁹²

(b) *Charter party*. In *Poydras Fruit Co., Inc. v. Weinberger Banana Company, Inc.*,⁹³ the owner of a ship sued to recover its value from a charterer who had been in possession of the vessel when it was destroyed by fire. No allegations of negligence being contained in plaintiff's petition, the case turned largely on questions of burden of proof under Article 2723 of the Civil Code and presumptions of negligence applied in similar cases by the admiralty courts. With great clarity it was pointed out that under Louisiana law, unlike the rule of the French Civil Code, a lessee is liable for the destruction of leased property by fire only "when it is proved that the same has happened either by his own fault or neglect, or by that of his family."⁹⁴ French law places the burden of proof on the lessee to show absence of negligence when leased property is destroyed by fire, while Louisiana law places the burden on the lessor to show that the fire was occasioned by the lessee's negligence. On the particular facts involved, the court held that the circumstances surrounding the origin of the fire raised a strong presumption of fault or negligence on the part of a fireman in the charterer's employ and the loss was placed on the lessee because this presumption of negligence was not overcome by any other possible explanation of the fire's origin.

Partnership

In *Champagne v. Keen*⁹⁵ the articles of agreement contained a clause providing: "This partnership shall begin on June 1, 1928 and endure for ten years, as aforesaid, reserving to any partner at the expiration of any twelve months period, but at least ninety days previous to any such expiration [the right] of giving notice of dissolution to the partner in writing for such time."⁹⁶ After the death of one of the partners on June 6, 1935, his widow and heirs sold his share in the partnership to the surviving partner but they reserved the right to sue for and claim a share of the profits for a period of ninety (90) days after his death by virtue of the quoted clause. It was held that the partnership terminated by the

92. Arts. 1931, 1932, La. Civil Code of 1870. Cf. *Temple v. Lindsay*, 182 La. 22, 161 So. 8 (1935), and *Pipes v. Payne*, 156 La. 791, 101 So. 144 (1924), both of which were distinguished by the court from the instant case.

93. 189 La. 940, 181 So. 452 (1938).

94. Art. 2723, La. Civil Code of 1870; see also Art. 2721, La. Civil Code of 1870 and Arts. 1732, 1733, French Civil Code.

95. 189 La. 681, 180 So. 485 (1938).

96. 189 La. at 683, 180 So. at 486.

death of one of the partners under the Code provisions.⁹⁷ The stipulation relied on by plaintiffs applied only to a dissolution of the partnership during the lives of the partners and conferred no rights after dissolution of the firm by death. It is difficult to see how the argument advanced on behalf of the plaintiffs in this case could have been seriously urged before the court as the clause is, by its very terms, patently inapplicable.

Security Contracts

(a) *Pledge*. In the enforcement of the debt, Article 3165⁹⁸ requires a judicial sale of the property pledged unless a private sale has been authorized by the pledgor. *Rembert v. Fenner & Beane*⁹⁹ construed this code provision strictly where the pledge contract authorized the private sale of pledged securities whenever they afforded an insufficient margin to the broker who held them. Since the brokers sold these securities only because they did not care to continue the plaintiff's account any longer, and not because of any insufficiency of margin, they were held responsible for the damages suffered by the plaintiff in repurchasing like securities.

(b) *Continuing Guaranties*. In the two cases involving continuing guaranty contracts, the court was able to clear up ambiguities by ascertaining the intent of the parties from other language of the contract. In *Interstate Trust & Banking Co. v. Sabatier*¹⁰⁰ the defense was interposed that the contract was only a special guaranty personal to the plaintiff's transferor.¹⁰¹ The court answered this argument by pointing out that the language whereby the defendants guaranteed payment of any indebtedness "owing to said bank, its successors and assigns" manifested the parties' intent that the contract was assignable. In *Reconstruction Finance Corporation v. Mickleberry*¹⁰² the trial court had maintained an exception of no cause of action *inter alia* on the ground that the guaranty contract sued on was unenforceable since it was undated and several blanks therein had never been filled out. In reversing the judgment appealed from, the Supreme Court pointed out that a notation on the reverse of one of the two notes sued on identified the guaranty contract with the note; hence the

97. Arts. 2876, 2880, 2882, La. Civil Code of 1870.

98. La. Civil Code of 1870, as amended by La. Act 9 of 1872.

99. 188 La. 385, 177 So. 247 (1937).

100. 189 La. 199, 179 So. 80 (1938).

101. Cf. *Citizens' Bank & Trust Co. v. Barthet*, 177 La. 652, 148 So. 906 (1933).

102. 189 La. 105, 179 So. 49 (1938).

two should be read together and each construed with reference to the other. The defense that indorsements on the reverse of one of the notes showed its payment in full was rejected on the ground that such indorsements were not sufficiently clear to show payment conclusively. This and other contentions¹⁰³ were held to be matters of defense to be urged on the trial of the case on its merits. The final defense that the defendants were discharged by the release of one of the solidary guarantors was overruled, in view of a full reservation of all rights against the other guarantors contained in such release.

(c) *Suretyship*. In *Ocean Coffee Co. v. Employers Liability Assur. Corp.*¹⁰⁴ the receiver of a corporation whose affairs were being liquidated appropriated certain funds of the receivership, illegally advancing a portion thereof to his son-in-law and retaining the balance. Such sums were set up on the receivership books as accounts receivable due by the receiver and his son-in-law. In due course of administration, all accounts receivable were sold to plaintiff. The latter eventually brought this suit against the surety on the receiver's bond to recover the sums wrongfully appropriated. The court overruled the defense that the indebtedness could not be partially assigned without the surety's consent, pointing out that the entire indebtedness had been assigned to plaintiff. The further defense that the bond sued on was a special guaranty enforceable only by persons acting for the corporation was likewise overruled. The court held that the plaintiff stood in the shoes of the corporation and the payment of the purchase price of the accounts receivable had discharged neither the indebtedness nor the accessory suretyship.

Article 3061¹⁰⁵ provides that the surety is discharged by any act of the creditor which impairs the former's right of subrogation to the mortgages and privileges held by the latter. This doctrine was applied in *Brewer v. Forshee*¹⁰⁶ where the court held that the act of the creditor in selling some of the movables af-

103. Additionally, the defendants contended that the second note sued on was not mentioned in the guaranty contract and that this note was payable to a bank other than the one in whose favor the guaranty contract was executed. The guaranty was for the prompt payment of all debts which the maker of the note "may now or at any time, or times hereafter, owe, or be liable to pay." Although the opinion does not show this clearly it seems that the second note was held by the bank in whose favor the guaranty was executed at the time of its execution.

104. 189 La. 11, 179 So. 18 (1938).

105. La. Civil Code of 1870.

106. 189 La. 220, 179 So. 87 (1938).

affected by a chattel mortgage discharged the guarantor of notes secured thereby.

(d) *Mortgages*. In the parish of Orleans, the inscription of recordation of a mortgage can be cancelled upon the mere presentation to the recorder of a notary public's certificate that the indebtedness has been paid and the mortgage note cancelled.¹⁰⁷ Despite recent conclusive proof of this system's potentialities for fraud, the Legislature has failed to remedy the situation. *Zimmer v. Fryer*¹⁰⁸ was the fruit of this vicious system. Because it felt that the purchaser could have avoided the loss by requiring the production of the cancelled note to be paraphed for identification with the notary's release of mortgage,¹⁰⁹ the court held that he purchased the property subject to the illegally cancelled mortgage. A plea of discussion was properly overruled in view of its inapplicability to property affected by a special mortgage. Similarly, the purchaser's plea of estoppel was overruled because of his inability to prove knowledge by the mortgagee that he had bought and was improving the property. Finally, the court held that prescription of the mortgage note had been renounced by interest payments thereon by the maker.

(e) *Chattel Mortgages*. In the case of *In re Ruston Creamery*¹¹⁰ the lessor competed with a chattel mortgagee for the proceeds of the sale of property affected by the privileges of both. The mortgage was recorded prior to the commencement of the lease, but at the time of recordation the property was in the leased premises under a previous lease. All rent due under the latter had been paid. The court applied the doctrine that the lessor's privilege does not attach prior to the beginning of the term of the lease, and held the lessor's privilege subordinate to that of the chattel mortgage.

107. Art. 3374, La. Civil Code of 1870.

108. 190 La. 814, 183 So. 166 (1938).

109. Although the result of the case was undoubtedly correct, it would appear that this argument imposes an intolerable burden upon purchasers of property in Orleans parish. First, if the mortgage certificate shows no mortgages affecting the property, the purchaser would find it difficult to discover the existence of any which may have been cancelled fraudulently. Second, in some of the cases cleverly-forged facsimiles of the mortgage note have been cancelled and paraphed for identification with the release. Without the services of an expert it may be difficult for the prospective purchaser to discover the fraud. Apparently there are cases where even the maker of the note has not been able to determine which note was genuine and which was spurious. See *Cassard v. Woolworth*, 165 La. 571, 115 So. 755 (1928). The remedy lies, not in the imposition of intolerable burdens upon third persons, but, in the abolition of the vicious system which makes such fraud possible.

110. 190 La. 631, 182 So. 715 (1938).

(f) *Antichresis*. A pignorative contract seldom employed in Louisiana today is the pledge of immovable property. Despite its rarity, however, antichresis¹¹¹ played a leading role in one of the most important cases (insofar as the value of property involved is concerned) decided in recent years. As has been pointed out hereinabove,¹¹² *Gautreaux v. Harang*¹¹³ held that the contract in controversy was one of antichresis rather than of sale. The defendants' demand for the reformation of the instrument, so as to have it decreed a sale, was denied on dual grounds. The action was held barred by the prescription of ten years; and the court further found that clear and definite proof of mutual error was lacking. All plaintiffs except an attorney had transferred to the latter a half interest in the property as a contingent fee for professional services to be rendered and costs to be expended. The nullity of this transfer, as the sale of a litigious right, was asserted by the defendants. Since, at the time of the transfer no litigation was pending, this contention was properly overruled. An instrument, executed by all plaintiffs except the attorney, purported to recognize the contract as a sale and further to quitclaim to defendants any rights to the property which such plaintiffs might have. This instrument was relied on confidently by defendants to defeat the claims of the plaintiffs executing it. The court, however, found that it had been procured through false representations, and refused to give the instrument any effect. Defendants were unable to render any accounting of the revenues of the property during the fourteen years in which they and their father had possession thereof. Because of this, the court rejected defendants' claim for judgment for the amount of principal and interest due on the debt, holding that the revenues of the property during this period would be presumed to have liquidated the indebtedness in full.

Criticism of the action of the court in *Gautreaux v. Harang* in excluding the testimony of the notary who drafted the instrument in controversy, offered for the alleged purpose of proving the intention of the parties, would not appear to be justified.¹¹⁴

111. For a short but excellent discussion of this subject, see Comment (1938) 13 Tulane L. Rev. 131.

112. *Supra*, p. 344.

113. 190 La. 1060, 183 So. 349 (1938). See Comment (1938) 13 Tulane L. Rev. 131.

114. Parol evidence is admissible to resolve the ambiguities of a written instrument. But here, in effect, the court held that the recorded act of mortgage was made part of the instrument in controversy by reference, and that when construed therewith the contract was not ambiguous. There is at least one analogy which justifies this application of the doctrine of "incorporation

Insofar as our jurisprudence is concerned, the most important question presented was whether the debt must be set forth expressly in the instrument evidencing the antichresis. The trial judge, looking only to the instrument itself and finding no definite indebtedness shown thereon, held that this essential of antichresis was lacking. He therefore held the contract to be a sale. The appellate court disagreed with the court *a qua*, finding that a definite indebtedness was shown by the instrument in controversy and the act of record to which it referred.¹¹⁵ Impliedly, the *per curiam* opinion denying a rehearing recognized that the statement of a definite debt was an essential of antichresis. It found this essential, however, in the instrument under controversy and the recorded mortgage to which it referred.

(g) *Miscellaneous. Interstate Trust & Banking Co. v. Breckenridge*¹¹⁶ presented for adjudication the question of whether certain instruments were participating certificates issued in connection with the deposit of securities, or whether they were moneyed obligations of a defunct securities company secured by a pledge of these securities. Since the instruments evidenced no obligation of the securities company to pay them, and as they were designated as such on their face, the court held them to be participating certificates.

D. SUCCESSIONS

Wills

(a) *Form.* A strict observance of the letter of the law on form of wills is presented in the case of *Soileau v. Ortego*.¹¹⁷ Two of the witnesses to a testament (alleged to be valid as a nuncupative will under private act) were residents of another parish, leaving but three witnesses and the notary as witnesses from the parish where the testament was made. The court stated that the requirements

by reference." Art. 3306, La. Civil Code of 1870, requires a sufficient description of the property sought to be mortgaged to be stated in the act itself. Our courts have held, however, that where an insufficient description in the act of mortgage refers to a recorded act giving a full description of the property, the mortgage is valid. *Baker v. Bank of Louisiana*, 2 La. Ann. 371 (1847); *Thornhill v. Burthe*, 29 La. Ann. 639 (1877).

115. This conclusion was based on the theory of incorporation by reference. It would seem that on this point, under a different approach, the French courts would have gone much further than did the Supreme Court of Louisiana. Parol evidence would have been received to show the indebtedness, if there was present the commencement of proof in writing. 12 *Planiol et Ripert, Traité Pratique de Droit Civil Français* (1927) 282, n° 285; Art. 1347, French Civil Code. Certainly the instrument in controversy would have constituted such commencement of proof in writing.

116. 189 La. 1057, 181 So. 535 (1938).

117. 189 La. 713, 180 So. 496 (1938).

of Article 1581 of the Civil Code for a nuncupative testament under private signature were mandatory, and since the instrument under examination failed to meet them, it was invalid. In the *Succession of Patterson*¹¹⁸ the alleged testatrix died on November 26, 1936; on March 18, 1937 a purported will was found. The document is set forth for examination by the reader:

"To my three nieces—

Nena H. Wadleigh

Pauline W. Markel

Maude W. Barton

I make a present of One Hundred shares of my First National Bank stock of Chicago, Illinois to be equally divided between them—which will not be included in my will—

Gertrude P. Patterson

Alexandria, Louisiana

February first

Nineteen hundred twenty six."

The court found that the above was not testamentary in either form or substance. Consequently, the succession was treated as intestate and an administrator in the person of a great nephew of the deceased was appointed.

(b) *Interpretation.* In the *Succession of Ferrara*¹¹⁹ the original will in question was not set forth *in toto* and, consequently, perhaps a fair estimate of the court's interpretation cannot be reached. The court stated that "The only bequest made in the will was the bequest to the husband, Salvatore Ferrara, of the usufruct of whatever property the testatrix might own at the time of her death. She declared in the will: 'At the death of my husband my property belongs to my heirs.'"¹²⁰ The testatrix left no property except her share of the community, which the court held was not covered by the words of her testament. Just what else the testatrix could have meant seems hard to discover. Whatever sound underlying reasons the court may have had for the decision, the plain intention of the testatrix, as disclosed by the cited excerpt from the opinion, seems to have been entirely disregarded. In *Succession of Provost*¹²¹ the first question decided by the court was one of interpretation of the will. A husband left his disposable portion, one-third of his property, to his wife. He

118. 188 La. 635, 177 So. 692 (1937).

119. 189 La. 590, 180 So. 418 (1938).

120. 189 La. at 594, 180 So. at 420.

121. 190 La. 30, 181 So. 802 (1938).

also left her a specific bequest of movables. Children of a previous marriage insisted that this bequest of movables was the only gift, although the testament used the words "included in this one-third." The bequest was very properly held to be one-third of the estate of the deceased. The second contention concerned an accounting between the community and the separate estate of the testator. Plaintiff failed to show that certain separate funds were actually used for the benefit of the community and furthermore, was unable to prove what part of certain funds belonged to the community and what to the separate estate. Plaintiff's demands were therefore rejected.

(c) *Marital Portion.* In *Succession of Tacon*¹²² the court laid down the principles that a widow may claim either the marital portion or the \$1,000 homestead, and that a succession does not have to be insolvent in order for her to elect the latter if she cares to, and finds it to her advantage. In *Succession of Tacon*,¹²³ presenting another phase of the same claim, the sole question was the correctness of an item charging the widow with the value of the occupancy of property belonging to the succession. This charge was not allowed as it was unsupported by the evidence. In *Taylor v. Taylor*¹²⁴ the plaintiff, husband, was awarded the marital portion in imperfect usufruct. The deceased wife had died intestate leaving one adopted child. The contention was that since the deceased wife did not obtain delivery of her share of her mother's estate before her death, that the financial condition of the husband had not been changed, so as to leave him "poor" in the sense of having been suddenly bereaved of accustomed affluence. The court, recognizing the doctrine of *le mort saisit le vif*, declared that the inheritance of the wife's share of her mother's estate had actually been hers. There was additional proof that she had been receiving and spending the revenues sent by the administrator of her mother's estate. The marital fourth was awarded in imperfect usufruct, since the estate was in negotiable bonds. The court decided after careful deliberation and a full review of authorities, that the husband did not have to give security as his usufruct was a legal one and no issue of a previous marriage was left, but only an adopted child of the husband and wife. The cases of *Conner v. Administrators and Heirs of Con-*

122. 188 La. 510, 177 So. 590 (1937), noted in (1938) 12 Tulane L. Rev. 639.

123. 190 La. 158, 182 So. 133 (1938).

124. 189 La. 1084, 181 So. 543 (1938), noted in (1938) 13 Tulane L. Rev. 154.

ner¹²⁵ and *Waring v. Zunts*¹²⁶ were overruled insofar as they conflicted with the decision on the security point.

Miscellaneous

In the case of *Succession of Haydel*,¹²⁷ the testator left a will giving a piece of community property to his natural child. His interdicted wife's curatrix wished to set aside the will on the ground that the natural child was adulterine. The will was good under the plain terms of Article 1488. The only valid attack would have been one to reduce the amount of the legacy. Since the donation was not excessive for support, it was not subject to reduction. The judgment was, of course, excellent and followed the unmistakable language of the Civil Code.

The *Succession of Vance*¹²⁸ dealt simply with the matter of homologating an inventory, appraisals of land, and so forth. The lower court's judgment was wisely affirmed.

In *Perryman v. Trimble*¹²⁹ after the death of the lessor, the plaintiff lessee availed himself of Act 123 of 1922¹³⁰ and deposited his rent in court, as the children and widow in community were both claiming it. The children tried to prove that the mother had renounced the usufruct on the community property, but they failed in this proof, and the mother, of course, was awarded all the rent as a civil fruit of her usufruct.

The case of *Succession of Faust*¹³¹ was a simple matter of reducing a remunerative donation to the estimated value of nursing services rendered. The gifts inter vivos in question were bonds given to two daughters by the mother. After a proper value was placed upon the services the rest of the gift had to be collated.

*Tillery v. Fuller*¹³² was a petitory action. The case is largely concerned with a matter of proof in an unsuccessful attempt to rebut the presumption that property bought during coverture falls into the community. Application of familiar rules of prescription appear. The rule of suspension during minority was applied to Article 1030 of the Civil Code, giving 30 years within which an heir may elect to accept or reject a succession. If no acceptance is made within the period "his failure to accept will

125. 13 La. Ann. 157 (1858).

126. 16 La. Ann. 49 (1861).

127. 188 La. 646, 177 So. 695 (1937).

128. 189 La. 176, 179 So. 72 (1938).

129. 189 La. 398, 179 So. 577 (1938).

130. Dart's Stats. (1932) § 1556.

131. 189 La. 417, 179 So. 583 (1938).

132. 190 La. 586, 182 So. 683 (1938).

inure to the benefit of any co-heir or co-heirs who may have accepted, or of any heir next in degree who may have accepted, by going into possession of the estate."¹³³

In *Jung v. Stewart*¹³⁴ the court held that a notary was confined to the ministerial duty of carrying out the court's judgment order for partition and should have limited himself to that alone. Plaintiffs were not precluded from demanding collation, as that matter had not been the issue and was not referred to in the judgment for partition. The notary's inclusion of the item of collation was beyond his province and of no effect.

In *Succession of Elmer*¹³⁵ the testator left everything to his second wife. His six children filed opposition to the account rendered by the widow, executrix. The case is a factual resumé of their claims and the calculation of the children's légitime. The plea that the second wife lived in open concubinage with the deceased prior to his first wife's death was unavailing under Article 1481 of the Civil Code, as the bequest was made to her after she was the wife of the testator.

E. MINERAL RIGHTS

The case of *Producers Oil & Gas Co., Inc. v. Continental Securities Corp.*¹³⁶ is a case of strict interpretation of the terms of a lease. Certain sand was penetrated which was productive of gas in the locality of the well, but production was not such as was required to keep the lease in force. There was a cessation of operations for more than thirty consecutive days, which was contrary to the operation clause of the lease. The case of *Clingman v. Devonian Oil Co.*¹³⁷ presented a question said to be identical with that of *Le Rosen v. North Central Texas Oil Co., Inc.*¹³⁸ The assignee of an oil and gas lease deposited the rental in a bank to the credit of the lessor and the lessor's wife. The court decided that this did not place the sum within the sole control of the lessor who as husband was head and master of the community, because the law allows a wife to draw against such an account without the husband's authority or consent. The Chief Justice dissented as he had in the *Le Rosen* case. The rule seems manifestly unfair to honest lessees. The money was available to the husband within

133. 190 La. at 664-665, 182 So. at 709.

134. 190 La. 91, 181 So. 867 (1938).

135. 189 La. 1016, 181 So. 477 (1938).

136. 188 La. 564, 177 So. 668 (1937).

137. 188 La. 310, 177 So. 59 (1937), noted in (1938) 12 Tulane L. Rev. 465.

138. 169 La. 973, 126 So. 442 (1930).

the terms provided and the mere fact that the wife could have withdrawn it, which she did not, is a small technicality upon which to base the lapse of a valuable right. In *United Gas Public Service Co. v. Mitchell*¹³⁹ an imperfect description in an assignment of lease was held not to bind a small tract included in the blanket clause of the original lease purporting to cover all contiguous lands of the lessor.

In *Andrus v. Tidewater Oil Co.*¹⁴⁰ a minors' lease was at issue. The defendant oil company contended that rentals were to be paid prior to February 12, 1935 within 12 months from the date the lease was executed. The plaintiffs contended that rentals were to be paid in advance of October 29, 1935 under the provisions of the lease. The order of the court granting the right to lease the minors' property showed that the lease was to be for a primary term of five years, beginning October 29, 1934. The court held, in protecting the minor from the least injury, that the dates set out in the order of court from which the lease got its binding force should rule.

The case of *Logan v. Tholl Oil Co.*¹⁴¹ raised the question as to when a lease terminates because of cessation of production in paying quantities. The question, of course, is factual. After finding that four wells had been abandoned and that the remaining four were small pumpers, producing only about one-third of a barrel each and giving plaintiff slightly over \$5.00 per month, it was held that the lease had ceased to produce in paying quantities within the meaning and terms of the contract. Damages were allowed only for attorney's fees in the amount of \$500.00 with legal interest from judicial demand. The case of *Louisiana Canal Co. v. Heyd*¹⁴² again raised the question of division of royalty. The court made it plain that from the mere fact of the parties joining in the same lease contract there does not arise a presumption that they intended to pool. The rule laid down is one of intention of the parties for which no hard and fast principle of interpretation can be given. The court was not guided by any knowledge of acts of the parties before the discovery of oil which would indicate the construction which they, themselves, had put upon the contract; but it decided, as a reasonable conclusion of intention, that the contract showed agreement to share ratably—in proportion to acreage—in royalties from oil produced from any part of the tract.

139. 188 La. 651, 177 So. 697 (1937).

140. 189 La. 142, 179 So. 61 (1938).

141. 189 La. 645, 180 So. 473 (1938).

142. 189 La. 903, 181 So. 439 (1938).

The settled question was again referred to that, where two adjacent tracts of land owned by different parties are covered by the same lease, development of any part keeps the lease alive as to the whole. The case of *Tomlinson v. Thurmon*¹⁴³ reiterated the doctrine that a mineral lease is an incorporeal right, that the sale of such a lease carries an implied warranty, and that the lessor is answerable for damage and loss sustained by the lessee in case of eviction, citing *Gulf Refining Co. v. Glassell*.¹⁴⁴ The court also restated the principle of *Roberson v. Pioneer Gas Co.*¹⁴⁵ that where a lessee transferred the lease without retaining an overriding royalty, an assignment and not a sublease resulted.

The case of *Kennedy v. Pelican Well Tool Supply Co.*¹⁴⁶ is a very important one in the annals. The issue was whether the signing of a lease by certain land owners and the defendant company, mineral right owner, was a joint lease which had the effect of interrupting the running of prescription against the mineral rights, under the authority of *Mulhern v. Hayne*.¹⁴⁷ Conceding the doctrine of the *Mulhern* case that a joint lease would have the effect of interrupting prescription, the court found that the lease in the instant case was not a joint lease. The lease was signed by the land owners without knowledge that the holder of the mineral rights would later be asked or permitted to sign the same lease. The court found that not a joint lease but separate leases had been confected which did not have the effect of acknowledgment and, hence, did not interrupt prescription.

The case of *Goldsmith v. McCoy*¹⁴⁸ presented a plea of acknowledgment to interrupt prescription of a mineral right by statements made in an unrecorded lease. The court found that the statements relied upon were mere acknowledgments of ownership and were unaccompanied by any statements of purpose or intention to interrupt the prescription then accruing. The case is very important for the fact that it may be said to settle the question of recordation of acknowledgment. The court clearly stated that any contract, whether intended to create or acknowledge an existing servitude, must be recorded in order to effect third parties in good faith.

143. 189 La. 959, 181 So. 458 (1938).

144. 186 La. 190, 171 So. 846 (1936).

145. 173 La. 313, 137 So. 46 (1931).

146. 188 La. 811, 178 So. 359 (1938).

147. 171 La. 1003, 132 So. 659 (1931).

148. 190 La. 320, 182 So. 519 (1938).

In *Superior Oil Producing Co. v. Leckelt*¹⁴⁹ co-owners were held to have consented to a mineral lease by acquiescing in the payment of certain royalties. They consented to the receipt of benefits of the servitude and thereby consented to its use, which interrupted the running of prescription. The case of *English v. Blackman*¹⁵⁰ set forth with great clarity and full documentation the two rules involved, namely: that an acknowledgment alone of any variety will not interrupt prescription, but when coupled with a clear intent and purpose to have that effect the court will recognize the party's privilege to so deal with his right. The law being very "clear," all that the court had to do was to find out from the evidence the intent of the party against whom prescription was pleaded. Though the evidence was conflicting and the court recognized that "... financial interest does sometimes 'warp men from the living truth,'"¹⁵¹ the landowner's corroborative testimony was believed that he did not have any "agreement" with regard to the lease, that he had never had any "consultation" with the adverse parties, that he did not know they intended to sign the lease later, and "emphatically" that no other names appeared as lessors in the document when he signed it. One "certain" fact appeared, that the parties did not sign the lease in the presence of one another. While obviously that fact can scarcely be said to be necessary or sacramental to the proof of a lease "joint" and with "intent" to interrupt, certainly it is a most persuasive one in the absence of other evidence of "clear intent." Estoppel was also pleaded in this case by virtue of accepted benefits but was unsuccessful.

The case of *Ford v. Williams*¹⁵² reaffirmed the rule of *Sample v. Whitaker*,¹⁵³ holding that the minority of an heir to a mineral servitude suspends the prescription of ten years non-user of that right. The facts vary slightly. One Mading held a 1/64 interest in the mineral servitude as community property; his wife died leaving a five months' old child; the mineral interests which this child inherited from her mother, 1/128, was adjudicated later to the father by the district court. Thereafter, but still within the ten-year prescriptive period, the father died, leaving the minor as his sole heir. The petition for cancellation itself showed "that

149. 189 La. 972, 181 So. 462 (1938); See also *Superior Oil Co. v. Leckelt*, 189 La. 990, 181 So. 468 (1938).

150. 189 La. 255, 179 So. 306 (1938).

151. 189 La. at 264, 179 So. at 309 (1938).

152. 189 La. 229, 179 So. 298 (1938).

153. 172 La. 722, 135 So. 38 (1931).

there was never a continuous period of as much as ten years during which the minor . . . did not own an interest in the servitude."¹⁵⁴ The court held that prescription against the servitude as a whole and as to all parties holding an interest, was suspended during the period of five months and one day that the minor held an interest, from the date of her mother's death until the adjudication of her interest to her father; and that the prescription ran again during the term of her father's possession and was suspended again at his death, when his 1/64 interest vested in the minor. The mineral servitude was expressly declared to be a "heritable" servitude, which had been tacitly held in *Sample v. Whitaker*¹⁵⁵ and indicated in other decisions, notably, in the foundation servitude case of *Frost-Johnson Lumber Co. v. Salting's Heirs*.¹⁵⁶ A new and interesting theory was introduced in the instant case as counsel's second contention, to the effect that suspension for minority should not have resulted during the interim between the mother's death and adjudication of the minor's interest to the father, because during that term, the father held a usufruct of the minor's interest and the burden was upon him as usufructuary to exercise the servitude. This theory is well supported by the articles of the Civil Code. The court simply stated that "Conceding without holding that the father as usufructuary could have exercised the rights which counsel say he could, it does not follow that his failure to do so deprived his minor child of the benefit which the law gives her."¹⁵⁷

The case of *Childs v. Porter-Wadley Lumber Co.*¹⁵⁸ illustrates the situation where prescription began to run against the minor. The minor was a stockholder in a corporation and at the dissolution of the corporation, a fractional interest in the mineral servitude vested in her. Suit for slander of title was brought by a possessor of the land whose deed of exchange contained no mention of an outstanding servitude. This possessor was in good faith though he obtained the property from his brother whose deed recited the mineral reservation which had also been registered in the parish conveyance records. Prescription began to run against the minor and her co-owners when the land was conveyed to plaintiff, but "could not accrue until she reached the age of twen-

154. 189 La. 229, 234, 179 So. 298, 299 (1938).

155. 172 La. 722, 135 So. 38 (1931).

156. 150 La. 756, 91 So. 207 (1922).

157. 189 La. 229, 240, 179 So. 298, 301 (1938).

158. 190 La. 308, 182 So. 516 (1938).

ty-two years."¹⁵⁹ When the minor became 22, however, the owner of the land had possessed it for only eight years, four months and eleven days. Even giving the defendant the benefit of the possibility that prescription did not begin to run against the minor until "the effective date of Act 64 of 1924,"¹⁶⁰ the suit was filed more than ten years from that time.

The case of *Roy O. Martin Lumber Co. v. Hodge-Hunt Lumber Co.*¹⁶¹ presents a case of donation to two minors of a 1/64 interest, each, in mineral rights. No use of the right was made during the ten year period and when cancellation was sued for, the plea of suspension because of the minors' interests was entered. The donor practically admitted that the gifts were made for the purpose of suspending prescription but the contention was made "that the motive of the donors is immaterial if they complied with the law and that one taking advantage of any provisions of the law which are favorable to him is entirely within his legal rights and is not guilty of any fraudulent or immoral conduct, citing, 'One cannot be guilty of fraud by doing what he has a legal right to do. A Court does not inquire into one's motives for doing a lawful act.'"¹⁶² The Court considered the donation under all the circumstances to be a simulation and refused to grant a suspension. It said: "We are not confronted with a case where we are called on to protect a minor's interest but are confronted with a case wherein minors are interposed for the sole purpose of defeating the landowner of his rights and one where a corporation is seeking by manipulation and subterfuge to continue a servitude without developing or producing oil or making any effort to that end as was contemplated by the parties when the servitude was granted."¹⁶³ There seems to be no good reason why a bona fide donation inter vivos or mortis causa to a minor should not have the same effect as the legally inherited interest in the *Sample* case had, if it occurred at a time and under circumstances which were "not suspicious." The person of his donor, the amount of the donation and the purpose of the gift would obviously have to be considered.

159. 190 La. 308, 317, 182 So. 516, 518 (1938).

160. 190 La. at 317, 182 So. at 518. (La. Act 64 of 1924 amended Art. 3478, La. Civil Code of 1870.)

161. 190 La. 84, 181 So. 865 (1938).

162. 190 La. at 88, 181 So. at 866.

163. 190 La. at 90, 181 So. at 867.

F. PRESCRIPTION

Liberandi causa. All actions to annul public sales affected only with relative nullities are prescribed in two years.¹⁶⁴ In *Phoenix Building & Homestead Ass'n v. Meraux*¹⁶⁵ plaintiff's action for specific performance of a contract to sell was resisted on the ground that plaintiff's title was defective. It was contended that a judicial sale constituting a link thereof was null because it was held on the Saturday following the date of sale scheduled by the advertisement. This defect was held to be a relative nullity, cured by the lapse of two years. In *Ernest Realty Co. v. Hunter Co.*¹⁶⁶ plaintiff's jactitory action was resisted by the plea of a superior title in defendant. The latter deraigned title through a judicial sale which plaintiff contended was null since the advertisement thereof was not published in a newspaper, but in a legal trade paper. Again the court applied the prescription, holding that this relative nullity¹⁶⁷ had been cured by the lapse of the prescriptive period. To plaintiff's argument that, under the doctrine *quae temporalia*, prescription could not be invoked against him, the court properly answered that since the action sought to improve rather than to preserve plaintiff's position, the maxim was not applicable.

Of the other two cases involving prescription *liberandi causa*, one applied the trite principle that prescription would not run against a creditor holding a pledge to secure the debt.¹⁶⁸ In the other, *McGuire v. Monroe Scrap Material Co.*,¹⁶⁹ the doctrine *contra non valentem* was extended.¹⁷⁰ It was held that prescription barring an action to recover the value of property wrongfully appropriated did not commence to run until the owner discovered the identity of the person wrongfully appropriating the property.

Acquirendi Causa. Of the seven cases involving this type of

164. Art. 3543, La. Civil Code of 1870, as amended by La. Act 231 of 1932. The prescription is five years when minors or interdicts are affected.

165. 189 La. 819, 180 So. 648 (1938).

166. 189 La. 379, 179 So. 460 (1938).

167. Advertisement of the judicial sale in a legal trade paper instead of a newspaper was likewise held to be a relative nullity in *Williams v. Burnham*, 189 La. 376, 179 So. 459 (1938). There the judicial sale was held to have been ratified by the mortgagor's acceptance of a lease of the property from the adjudicatee.

168. *Liberty Homestead v. Pasqua*, 190 La. 25, 181 So. 801 (1938).

169. 189 La. 573, 180 So. 413 (1938).

170. The holding *supra* goes somewhat beyond the previous limits of the doctrine. Cf. *Reynolds v. Batson*, 11 La. Ann. 729, 730 (1856). See also, Comment (1938) 12 Tulane L. Rev. 244. But see, *Jones v. Texas & P. Ry. Co.*, 125 La. 542, 547, 51 So. 582, 584, 136 Am. St. Rep. 339 (1910).

prescription, one¹⁷¹ involved only factual issues. In *Hill v. Dees*¹⁷² the court applied the general rule that one co-owner cannot prescribe against the title of another.¹⁷³ In *Crawford, Jenkins & Booth v. Wills*¹⁷⁴ it was held that where the owners of property did not go into possession until more than three years after a valid tax sale to another, their possession subsequently would not affect the title to the property unless it continued for 30 years.

A lesser corporeal possession is required of one asserting title to timber lands through the prescription of 10 years than would be necessary to acquire title to cultivated lands under an adverse possession of 30 years.¹⁷⁵ In *Zylks v. Kaempfer*¹⁷⁶ the prescription of 10 years was pleaded to an action to recover an undivided interest in a tract of land, the greater portion of which was wooded, and only a very small part of which was under cultivation. The court held the following sufficient to constitute the necessary corporeal possession: granting of rights of way for a railroad and public highways; sale of merchantable timber; and execution of a mineral lease thereon. The possession of defendant and her ancestors was held sufficient to acquire title by the prescription of 10 years where they possessed as owners and had no contractual relationships with the plaintiffs.

Article 3498¹⁷⁷ announces the general rule that possession of a portion of land by a person holding title thereto is presumed to be possession of the whole. *Feazel v. Peek*¹⁷⁸ applied the doctrine to the case where the defendant, under an ostensible title transmissive of ownership, in good faith took possession of a portion of the land involved with the intention of possessing the entire tract as owner, and the court held that he acquired a valid title to the entire tract under the prescription of 10 years. One difficulty with this doctrine of constructive possession is presented when two adverse claimants take corporeal possession of different portions of the property, each intending to possess the whole as owner. Ob-

171. *Gibson v. Fitts*, 189 La. 753, 180 So. 509 (1938).

172. 188 La. 708, 178 So. 250 (1938).

173. It is possible for one co-owner to prescribe against the title of another, but "his possession [must be] so clearly hostile and adverse to the rights of the other that notice will be given to the latter of the intent to henceforth hold *animo domini* all of the common property." Comment (1938) 12 Tulane L. Rev. 608, 620. See also, *Liles v. Pitts*, 145 La. 650, 82 So. 735 (1919).

174. 189 La. 366, 179 So. 455 (1938).

175. Comment (1938) 12 Tulane L. Rev. 608.

176. 189 La. 609, 180 So. 425 (1938).

177. La. Civil Code of 1870.

178. 189 La. 61, 179 So. 35 (1938).

viously, the presumption voiced by the code provision cannot result in both having possession of the whole simultaneously. *Ernest Realty Co. v. Hunter Co.*¹⁷⁹ applied one of the well settled exceptions to the rule. There, the defendant had a prior corporeal possession of the property, and it was held that plaintiff acquired possession only of such property as he had actually possessed and occupied, by enclosures and other vestiges of possession; and the burden of proving the extent of such actual possession was held to be on plaintiff.

Tyson v. Spearman,¹⁸⁰ presenting principally factual issues, involved the title to valuable oil lands in the Rodessa field. Plaintiffs sought to recover a half interest therein on the ground that they or their ancestors were five of the ten natural children of Louisa Tyson, a former owner of the property. Defendants had acquired the property from the other five irregular heirs. Finding that all of the defendants were chargeable with notice of sufficient facts to preclude them from relying upon the "estoppel" sanctioned by Article 1839,¹⁸¹ and that there was no sufficient possession to prove the prescription of 10 years pleaded, the court overruled both defenses. The principle that the prescription of 10 years cannot be bottomed on an act of sale which effected a conventional partition was affirmed, the court pointing out that a partition was not translatif of title but merely declaratory thereof.

IV. TORTS AND WORKMEN'S COMPENSATION

Torts

Negligence, and libel and slander make up the cases disposed of by the Supreme Court in the field of torts during the past term.

Negligence. The negligence cases involve automobile or railroad collisions. Nothing new is brought to light in them. *Aaron v. Martin*¹ tends to restrict the doctrine that negligence of a driver may not be imputed to the guest. Here the guest in the automobile was held contributorily negligent for failure to warn the driver of an impending collision with a train. The court disavowed adherence to the doctrine that a guest in an automobile may have the negligence of the driver imputed to him. But if

179. 189 La. 379, 179 So. 460 (1938).

180. 190 La. 871, 183 So. 201 (1938).

181. La. Civil Code of 1870.

1. 188 La. 371, 177 So. 242 (1937).

failure to warn is held to be independent contributory negligence, the doctrine of imputability is hardly needed in many cases.

The doctrine of "last clear chance" came before the court in two cases. In *Jackson v. Cook*² it was held that a motorist, who failed to keep a proper lookout, was liable for striking a drunken pedestrian who was negligently on the highway. In *Russo v. Texas & Pacific Railway Company*³ failure of a locomotive engineer to keep a sharp lookout, thus not noticing a pedestrian walking down the track, was held to subject the railroad to liability on the doctrine of last clear chance. These two cases clearly indicate that the Louisiana court does not look with favor upon the limitation of liability to "discovered peril" but extends it to perils which should be discovered.

*Louisiana Power and Light Co. v. Saia*⁴ held that the defendants have the right to raise the issue of contributory negligence by exceptions of no right or cause of action where plaintiffs' only reason for failing to see a parked unlighted truck and trailer was that "it was quite dark." The doctrine that a motorist is held to have seen an object which, by the exercise of ordinary care he would have seen in time to avoid running into, served to bring the plaintiff to grief here. To drive at a greater speed than that which will permit one to stop within the range of vision is negligence.

A non-resident defendant claimed that substituted service was inefficacious where the injury occurred on a side road, since the statute refers to public highways. Strangely enough, this contention was successful in the trial court. Upon appeal, the ruling was reversed by the Supreme Court. *Galloway v. Wyatt Sheet Metal & Boiler Works*.⁵

Libel and Slander and Malicious Prosecution.⁶ A minister of the gospel, while riding on a bus, was seized with an apoplectic fit. Though conscious, he was unable to make any sign. When the bus reached the terminal and the plaintiff failed to leave, the employees of the defendant assumed he was drunk and deposited him on a bench in the waiting room. Shortly thereafter the plaintiff was discovered prone on the floor. The ticket seller of the de-

2. 189 La. 860, 181 So. 195 (1938).

3. 189 La. 1042, 181 So. 485 (1938).

4. 188 La. 358, 177 So. 238 (1938).

5. 189 La. 837, 181 So. 187 (1938).

6. In *Calavartenos v. Southeastern Raw Fur Merchants of La.*, 189 La. 94, 179 So. 46 (1938), it was held that the evidence was insufficient to show that the plaintiff acted maliciously and in bad faith in bringing the suit.

fendant, likewise assuming that the plaintiff was drunk, telephoned the police that a drunken man was lying on the waiting room floor. The police took him to headquarters, booked him on a charge of drunkenness, threw him on a cot in a cell, from which he slipped to the floor, and left him there for 24 hours. The plaintiff asked damages from the defendant for suffering due to neglect and to his treatment at the hands of the police, and for slander to his name and reputation.

It was held that the defendant's servants were responsible for the inhuman treatment which the plaintiff received in the bus station and in the jail. For injury to his reputation, although it was shown that none of the plaintiff's parishioners believed the defamatory statements, the court awarded him what it called nominal damages, in the amount of \$1000.00. *Searcy v. Interurban Transportation Co.*⁷

The opinion does not discuss the problem of proximate or concurrent causation. If it had, this phase of the case would have been a distinct contribution to the tort jurisprudence of the state. It is apparent that the court was revolted by the inhuman treatment accorded one who, while in a helpless condition, was allowed to remain 24 hours without medical attention. The bus company's defense that its servants thought in good faith that the man was drunk, was unavailing. The moral to be drawn from the decision is obvious: since dead drunkenness and apoplexy are conditions hard to differentiate, it is the part of wisdom, if not of humanity, for common carriers to accord everyone so disabled the benefit of prompt medical attention.

In *Lewis v. Louisiana Weekly Pub. Co.*⁸ a newspaper was held liable for defamatory statements concerning an employment agency. In *Wisemore v. First National Life Insurance Co.*⁹ an insurance company was held liable on the doctrine of *respondeat superior* for slanderous statements of its agent concerning an agent of a rival company. There was evidence that the defamatory remarks were made in the presence of third parties whom the plaintiff was soliciting for business and whom the defendant's agent had called upon for the purpose of "getting them to keep in force their insurance contracts which they already had with the defendant company."

7. 189 La. 183, 179 So. 75 (1938).

8. 189 La. 281, 179 So. 315 (1938).

9. 190 La. 1011, 183 So. 247 (1938), noted *infra* p. 449.

The majority of the court felt that these remarks were made not only in the *course* of the employment but also within its *scope*. Mr. Justice Odom in dissenting, took a narrower view of the case. To his mind, the defamation was not within the *scope* of the employment.

Workmen's Compensation

Easily the most important decision on Workmen's Compensation during the last term was the case of *Harris v. Southern Carbon Co.*¹⁰ Here the court held, in interpreting section 20 of Act 20 of 1914 as amended,¹¹ that after final judgment awarding a specific sum for partial disability, the injured workman may sue anew for increased disability resulting from spread of infection. Three judges dissented, Mr. Justice Land remarking that the courts had no mandate to rewrite the compensation statute.

It was agreed by all that had this been an ordinary law suit, the doctrine of *res judicata* would have barred the plaintiff. The majority of the court, doubtless realizing that the plea of *res judicata* is an anomaly in the administration of continuing remedial statutes such as Workmen's Compensation Acts, felt impelled to deny the defense. The case is a good illustration of one of the chief difficulties with judicial administration of Workmen's Compensation. Constant supervision and flexible control are requisite to adequate administration of such matters. Courts are tempted to depart from their proper functions and to torture their procedure unduly when faced with problems of this sort.

In *Rogers v. Mengel Co.*¹² it was held that a logger injured while warming himself at a fire prior to returning home after learning that there would be no work that day because of inclement weather was held to have been injured in the course of employment. In *Stieffel v. Valentine Sugars, Inc.*¹³ the court ruled that seasonal employment of short duration, prompted by employers' sympathy, does not prevent an injured employee from recovering for total and permanent disability.

*Jones v. Husicker*¹⁴ held that under the head of medical expenses an injured workman may not recover for fees charged by physicians for testifying as expert witnesses; *Nevils v. Valentine*

10. 189 La. 992, 181 So. 469 (1938).

11. By La. Act 85 of 1926, § 1 [Dart's Stats. (1932) § 4410].

12. 189 La. 723, 180 So. 499 (1938).

13. 188 La. 1091, 179 So. 6 (1938).

14. 188 La. 468, 177 So. 576 (1938).

*Sugar Co.*¹⁵ was a ruling that the evidence sustained the lower court's finding that the workman was a malingerer; and *Osborne v. McWilliams Dredging Co.*¹⁶ decided that supplemental pleading showed that the injury occurred in the scope of employment.

Finally, in *Rogers v. City of Hammond*¹⁷ it was held that a workman who wishes to dismiss a suit may do so regardless of the desire of his counsel to pursue an appeal. Apparently a lawyer has no vested interest in a workmen's compensation case.

V. CRIMINAL LAW AND PROCEDURE

Fifty criminal cases were decided during the judicial year 1937-1938—almost one-fifth of all the cases considered by the court. Of these, 33 were affirmed; in 17 the Supreme Court reversed, remanded, or otherwise set aside the decision of the district court.¹ These figures indicate that there is one chance in

15. 188 La. 498, 177 So. 586 (1938).

16. 189 La. 670, 180 So. 481 (1938).

17. 190 La. 1005, 183 So. 245 (1938).

1. The lower court rulings were set aside for the following reasons: failure properly to give notice of meeting to two jury commissioners, *State v. Milton*, 188 La. 423, 177 So. 260 (1937); a grand juror was disqualified because a felony charge initiated in 1905 was still on file, *State v. Gunter*, 188 La. 314, 177 So. 60 (1937); failure of indictment to allege an essential element, *State v. Gendusa*, 190 La. 422, 182 So. 559 (1938); finding that the accused, tried in a district court, was under 17 when the "offense" was committed, *State v. Connally*, 190 La. 175, 182 So. 318 (1938); invalidity of a liquor ordinance, *State v. Reed*, 188 La. 402, 177 So. 252 (1937), *State v. Leatherman*, 188 La. 411, 177 So. 255 (1937), *State v. Lawrence*, 188 La. 410, 177 So. 255 (1937), *State v. Weil*, 188 La. 430, 177 So. 369 (1937), *State v. Wactor*, 189 La. 535, 179 So. 865 (1938); unconstitutionality of a local statute prohibiting trapping, *State v. Tabor*, 189 La. 253, 179 So. 306 (1938); *State v. Clement*, 188 La. 923, 178 So. 493 (1938); jury's viewing scene of crime in absence of accused, *State v. Pepper*, 189 La. 795, 180 So. 640 (1938); transcript incomplete, *State v. Pepper*, 189 La. 802, 180 So. 642 (1938); for prescription, accused must be fugitive from Louisiana justice, not from that of another state, *State v. Berryhill*, 188 La. 550, 177 So. 663 (1937); habeas corpus dismissed because accused had waived defects in indictment, *State v. Chicola*, 188 La. 694, 177 So. 804 (1937); father's letter concerning custody of his child was not libelous, *State v. Lambert*, 188 La. 968, 178 So. 508 (1938); a juror, charged with perjury on his voir dire, should have been permitted to show that he voted for conviction, *State v. Serpas*, 188 La. 1074, 179 So. 1 (1938).

The above recital is hardly an adequate index of the variety of issues presented by the criminal jurisprudence of the past year. The most important problems will be discussed in the text in some detail. As a very general characterization, it may be stated that the decisions deal with questions of procedure, evidence, pleading, administration, interpretation of statutes, substantive law, and constitutionality. Most important in this last field is *State v. Pierre*, 189 La. 764, 180 So. 630 (1938), involving the question whether negroes were improperly excluded from the juries. The United States Supreme Court has granted certiorari in this case, 59 S.Ct. 100 (1938). The same issue was ineffectively raised in *State v. Walker*, 189 La. 241, 179 So. 302 (1938), and in *State v. Dierlamm*, 189 La. 544, 180 So. 135 (1938) where the accused was a white man.

three of having a district court judgment in a criminal case reversed on appeal. This seems high.² But it cannot be inferred that the trial courts are correspondingly incompetent. A reading of the cases suggests rather that the criminal law of Louisiana, especially that part of it dealing with pleading, procedure and evidence, is in an uncertain and at times a very confusing condition. In some instances it is also apparent that, although the problem arises as a procedural one, the root of the difficulty is in the substantive law.

One of the most important problems dealt with in the year's jurisprudence has to do with aggravated assaults and batteries. The issues are revealed in three cases.

In *State v. Antoine*³ the charge was "cutting with a dangerous weapon with intent to murder," and the defendant was convicted of "cutting with a dangerous weapon with intent to kill." Counsel for defendant had moved that the jury be instructed to return one of the following verdicts: "(1) Guilty as charged, or (2) guilty of cutting with a dangerous weapon with intent to kill, or (3) guilty of cutting with a dangerous weapon with intent to kill and wounding less than mayhem, or (4) guilty of assault with a dangerous weapon, or (5) guilty of assault and battery, or (6) not guilty."⁴ The court charged only (1), (2) and (6), and rejected the others on the ground that they were not responsive. This judgment was affirmed.

As to instruction (3) (less than mayhem), the court's opinion seeks support by reference to assertions in prior jurisprudence to the effect that a charge under section 794 of the Revised Statutes⁵ is not included in section 791.⁶ The most recent case thus referred to, *State v. Mitchell*,⁷ is a similar decision which in turn refers to *State v. Murdoch*⁸ and *State v. Jacques*.⁹ The *Murdoch* case would have been eminently worth studying for it reveals a sharp cleavage in decision, a remarkably well reasoned opinion by Mr. Jus-

2. However four of the reversals dealt with a Rapides ordinance which was declared invalid. *State v. Reed*, 188 La. 402, 177 So. 252 (1937), *State v. Lawrence*, 188 La. 410, 177 So. 255 (1937), *State v. Leatherman*, 188 La. 411, 177 So. 255 (1937), *State v. Weil*, 188 La. 430, 177 So. 369 (1937).

3. 189 La. 619, 180 So. 465 (1938).

4. 189 La. at 623, 180 So. at 466.

5. La. Rev. Stat. of 1870, § 794, as amended by La. Act 17 of 1888 [Dart's Crim. Stats. (1932) Art. 768].

6. La. Rev. Stat. of 1870, § 791, as amended by La. Act 43 of 1890 [Dart's Crim. Stats. (1932) Art. 764].

7. 153 La. 585, 96 So. 130 (1923).

8. 35 La. Ann. 729 (1883).

9. 45 La. Ann. 1451, 14 So. 213 (1893).

tice Manning, and the fact that *State v. Delaney*¹⁰ is a case presenting precisely the same facts as in the instant one (stabbing, etc.). There is an assertion in the majority opinion in the *Murdoch* case that "the nature of the wound, which is of the essence of the latter offense [mayhem], is not directly or indirectly put at issue"¹¹ (in the major charge). It may be possible to support this view by drawing a particularly fine distinction (between mayhem and other batteries) which would seem to have hardly any application in the trial of actual cases. Indeed it is a moot question whether such a distinction is theoretically maintainable since the location and nature of the wound would be relevant to proof of the criminal intent. The facts regarding the wound having been presented to the jury, only the court's instruction on the definition of mayhem would be required to support a verdict as to the latter. Without pressing this view unduly, it may be suggested that re-examination of the jurisprudence was possible.

As to instruction (4) (assault with a dangerous weapon), the court asserted that an indictment which denounces "cutting" does not include a charge of "assault." This assertion would find readier acceptance if the reverse of the instant case were involved (that is, if the charge had been for "assault," and the verdict for "cutting") for the aggravated cutting offenses are uniformly more serious than the aggravated assault offenses. By like token, it is difficult to follow the court's holding in this regard. The question at bottom is, broadly, the relationship of criminal battery to criminal assault; and the various statutes, confusing as they are in the aggregate, do apparently reveal this one principle of differentiation. Tort law rather clearly supports the view upheld in the instant case; but in the criminal law, there is abundant doctrine to require at least examination into the question whether battery does not necessarily include assault. As to instruction (5) (assault and battery), this is ignored in the opinion because counsel did not press it. Yet clearly it is involved in the principles discussed above.

Related problems are raised in *State v. Dent*¹² where the indictment charged that the defendant "did . . . assault with a dangerous weapon with intent to murder." Defendant's motion to quash, on the ground that no crime was charged, was granted; whereupon the State was permitted to substitute "strike," for "as-

10. 28 La. Ann. 434 (1876).

11. *State v. Murdoch*, 35 La. Ann. 729, 731 (1883).

12. 189 La. 159, 179 So. 67 (1938).

sault." On trial before another judge, the amended indictment was quashed, and the State appealed. This ruling was affirmed, the Supreme Court pointing out that sections 791 and 792 of the Revised Statutes¹³ not only charged distinct and separate crimes, but also that a verdict responsive to one of them could not be responsive to the other.¹⁴

It is clear from the above cases that there is considerable confusion in the substantive law of aggravated assaults. "Intent to kill" is differentiated from "intent to murder"; "striking" is differentiated from "assault" (which, of course, is necessary for certain purposes); and partially repealing legislation¹⁵ has increased the existing difficulties. Confusion in the substantive law leads to unfortunate consequences in procedural law; we have noted the courts' difficulties in determining the responsiveness of various verdicts. Yet in the problem here involved, the solution is relatively simple; or perhaps, one had better say the solution ought to be simple, for, under existing Louisiana law, a number of unusual difficulties need to be overcome.

As regards the various assaults, and the responsiveness of verdicts, two simple propositions apply: in the substantive law, "striking with intent to murder" is at one extreme, while simple "assault" is at the other. The substantive law should make clear the series of gradations between these two. As for responsiveness, the major includes the minor cognate offense. Such a term as "mayhem" can be interpreted to accord with these principles; better yet, it might be omitted from the substantive law and replaced by language that does not conjure up ancient connotations.

The burden of the writer's comments on *State v. Antoine*¹⁶ was *not* that the court's decision cannot be supported, but that there was sufficient vagueness and uncertainty in the jurisprudence to have permitted re-examination of the problem on its merits; and that the objectives which ought to be attained and the principles underlying the problem might well have suggested another conclusion. The courts, whether they will or not, do perform a legislative function as they extend the jurisprudence step by step.

13. La. Rev. Stats. of 1870, § 791, as amended by La. Act 43 of 1890, § 1 [Dart's Crim. Stats. (1932) Art. 764]; La. Rev. Stats. of 1870, § 792, as amended by La. Act 59 of 1896 and La. Act 9 of 1912 [Dart's Crim. Stats. (1932) Art. 766].

14. *State v. Broxton*, 188 La. 456, 177 So. 572 (1937), involved La. Rev. Stats. of 1870, § 793 [Dart's Crim. Stats. (1932) Art. 767].

15. See Annotations in Dart's Crim. Stats. (1932) Art. 767.

16. 189 La. 619, 180 So. 465 (1938), cited *supra* note 3.

There are other, perhaps more serious consequences that flow from the *Antoine* case because the rule now definitely established imposes rigid limitations on the responsiveness of verdicts for these lesser cognate offenses. In the *Antoine* case, a conviction was upheld, but does that mean that the State will be the future beneficiary of the ruling? By no means. For let us now consider, in the light of the Louisiana jurisprudence of criminal procedure, in just what position the district attorneys are placed.

We may assume that a desirable system of prosecution would permit one trial of a defendant or group of defendants for a single act or transaction. It would therefore permit the allegation of various charges in one indictment, each of which fitted all or part of the alleged criminal act or transaction. Finally, it would permit flexibility as to responsiveness; and in this, as in all particulars in the attainment of the above objectives, there is no need to sacrifice any of an accused person's rights. Criminal law should continue to guard these rights as zealously as ever, but this paramount issue should not be used to becloud the problem or to hamper the accomplishment of common efficiency through the elimination of unnecessary technicality that prevents attainment of proper goals.

These objectives were clearly in the minds of those who drafted the Code of Criminal Procedure. This is apparent from Article 218, interpreted in relation to prior jurisprudence, especially *State v. Hataway*¹⁷ which held that "the rule that two or more crimes, if committed in one transaction, may be charged in one indictment, is subject to the qualification that the two or more crimes so charged 'are subject to the same mode of trial and nature of punishment.'"¹⁸

Clearly Article 218 extended beyond that rule, for the mode of trial was not retained as a limitation on the joinder of offenses. The steps by which this article was declared to be unconstitutional,¹⁹ then partially reinstated²⁰ to re-introduce the rule of the *Hataway* case, were completely determined by Act 153 of 1932 which repealed Article 218. Interestingly enough, in two cases following this repeal²¹ the rule in the *Hataway* decision has apparently been revived. Because this latter course brings the juris-

17. 153 La. 751, 96 So. 556 (1923).

18. 153 La. at 755, 96 So. at 557.

19. *State v. Jacques*, 171 La. 994, 132 So. 657 (1931).

20. *State v. White*, 172 La. 1045, 136 So. 47 (1931).

21. *State v. Mansfield*, 178 La. 393, 151 So. 631 (1933); *State v. Turner*, 178 La. 927, 152 So. 567 (1934).

prudence squarely in conflict with Article 217, it is clear that the repeal of Article 218 was an incomplete job. The Code of Criminal Procedure needs clear amendment on the very important question of joinder of offenses. While this broader question cannot be discussed here, it is necessary to perceive the cumulative effect of the limitations on joinder of offenses brought about by the repeal of Article 218 and on responsiveness of verdict produced by the *Antoine* and similar cases.

What is the resulting position of the district attorney? The dependence of the mode of trial upon the gravity of the penalty, and the wide range of such sanctions, places serious limitations on the joinder of various assaults and batteries. If he charges either an aggravated battery or an aggravated assault, then he faces rigorous restrictions as to possible verdicts. He is placed in a position where his procedure is inefficient from its very inception, and where the best he can expect—saving luck—is a battle in the uncertain arena of double jeopardy. Yet the objectives that ought to be realized are everywhere recognized as proper and laudable. They have been pointed out above; and while the problem in its totality is one of considerable complexity, there is every reason to believe that most of the difficulties can be removed.

Among other cases decided during the past judicial year involving, incidentally, questions of substantive law, the most important is *State v. Gendusa*.²² Defendant was charged with burglary under section 850 of the Revised Statutes, a capital offense.²³ The indictment omitted the allegation of a "breaking." The defendant's motion to quash was overruled, as were his motions in arrest and for new trial. He was convicted and sentenced to death. On appeal, this conviction was reversed and the case remanded, with Mr. Justice Higgins strongly dissenting. His opinion discloses a degree of ambiguity in the substantive law, and it must be conceded that the criminal statute involved (§ 850) is poorly drawn. The legislature might profitably re-examine the various types of burglary not only with a view to improved expression but also as regards the policy concerning "breaking." If that element is retained for the maximum offense, it may still be questioned whether there should be such disparity in penalties as now exists between section 850 and the next most serious type of burglary.

22. 190 La. 422, 182 So. 559 (1938).

23. La. Rev. Stats. of 1870, § 850, as amended by La. Act 21 of 1926, § 1 [Dart's Crim. Stats. (1932) Art. 818].

For the purpose immediately in hand, the position of the court as regards verdicts on substantially defective indictments is of major interest. In effect the court holds that Article 557 (which provides broadly that no conviction shall be set aside for error unless there is a miscarriage of justice) must be read in connection with, and is, indeed, superseded in part by Article 418 (which provides that the omission of any essential averment from an indictment "constitutes an incurable defect"). In a lengthy review of the jurisprudence, upon rehearing, the court maintained its original view that the allegation of a "breaking" was essential, and that its omission was not cured by the verdict.

In its opinion²⁴ the court did not consider Article 253,²⁵ with the result that the application of that very important provision remains obscure and in part nullified. In its survey of cases, the court does not distinguish those in which objection to the indictment was timely from those where the defense omitted to demur or move to quash. Yet it is clear from Articles 284 and 253 that this is a matter of first importance. On that basis, it is possible to classify the *Gendusa* case with *State v. Pinsonat*,²⁶ *State v. Mor-*

24. In the *Gendusa* case, a motion to quash was made; hence Art. 253 was not applicable. But the opinion goes far beyond the facts, and may well be the most important decision on the general problem of incurability of an essentially defective indictment. See Art. 253, La. Code of Crim. Proc. of 1928, in note 25, *infra*.

25. Art. 253, La. Code of Crim. Proc. of 1928: "No indictment shall be quashed, set aside or dismissed or motion to quash be sustained or any motion for delay of sentence for the purpose of review be granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection to such indictment, specifically stating the defect claimed, be made prior to the commencement of the trial or at such time thereafter as the court in its discretion permit. The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been empanelled and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights will be fully protected by the proceedings with the trial or by a postponement thereof to a later day with the same or another jury. In case a jury shall be discharged from further consideration of a case under this section, the accused shall not be deemed to have been in jeopardy. No action of the court in refusing a continuance or postponement under this article shall be reviewable except after motion to and refusal by the trial court to grant a new trial therefor and no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted."

26. 188 La. 334, 177 So. 67 (1937).

ris,²⁷ and *State v. Gunter*²⁸ as properly decided because in each of these cases Articles 284 and 253 were observed.²⁹

This leaves for special consideration *State v. Williams*³⁰ and *State v. McDonald*.³¹ In the former case, the defendant was charged with operating a "gambling" game. At the conclusion of the evidence, the State was permitted to amend the information by substituting "banking" for "gambling," thus bringing the charge within a penal statute. The trial court submitted that the defendant had not been injured because evidence of "banking" had been introduced, that defendant did not move for a continuance, and that Article 253 required the amendment as made. The Supreme Court reversed the decision. Article 253 was not analyzed, and because the trial was upon an information which did not allege an offense, it was held that "therefore it was prejudicial error to convict him of the offense charged in the amended information, without a hearing thereon."³² Presumably, in this case, the only manner of prejudice could be by way of surprise. Yet evidence of "banking" was introduced, and was contested by the defendant, who did not request any continuance. It does not seem unwarranted to conclude that the decision assumed what was to be proved (that there *was* prejudicial error) and that it did not carefully consider Article 253 in the light of its clear objectives.

The *Williams* conviction was for a misdemeanor. Of major importance is the *McDonald* case where the charge was burglary, and the sentence was to hard labor. The indictment charged that defendant broke and entered "The American Hat Company." Defendant's motion to arrest judgment on the ground that no shop, store, other building, and so on, had been alleged, was overruled. The conviction was set aside on the ground that the information was fatally defective, that is, it could not be cured by the verdict. The court relied on the *Williams* case, discussed above,

27. 185 La. 1037, 171 So. 437 (1936).

28. 188 La. 314, 177 So. 60 (1937).

29. These cases suggest that district attorneys might lean more definitely in the direction of acceding to the motion to quash where at least a clear doubt has been raised (as in the *Gendusa* case), for by such an attitude held by them and the trial judges who must take such a view, costly errors as have occurred might be avoided.

30. 173 La. 1, 136 So. 68 (1931).

31. 178 La. 612, 152 So. 308 (1934). The third case relied upon was *State v. Jackson*, 43 La. Ann. 183, 8 So. 440 (1891); it will be argued in the text that the Code of Criminal Procedure sought to prevent the very situation here presented.

32. *State v. Williams*, 173 La. 1, 8, 136 So. 68, 70 (1931).

and on the *Jackson*³³ case decided in 1891, where no motion to quash had been made. Obviously, if the Code changed the prior jurisprudence, the *Jackson* case cannot be invoked; the *Williams* case, as pointed out, did not analyze the points at issue. Hence the *McDonald* case is the only one of weight on the position taken, and this has unfortunately been re-enforced by dicta in the *Gen-dusa* case.

Article 284 was stressed in the *McDonald* case. The language of that article seems plainly to have enlarged the prior statute, for it provides that "every objection . . ." whereas section 1064 of the Revised Statutes provided that "every objection . . . for any formal defect . . . shall be taken by demurrer . . ." In spite of this clear language, the court in the *McDonald* case restricted Article 284 to formal defects. In the first place, the court supports its view to some extent by a rather strained interpretation of the wording of this article (whereas an eye to the purpose of Article 284 might well have led to the opposite view). Secondly, the court restricted Article 284 to formal defects because

" . . . if it had been intended by the adoption of the Code to deprive an accused person of the right to quash the proceedings by motion in arrest of judgment, because of his failure to demur or to file a motion to quash in limine, there would not have been put into the Code those articles under title 26, which relate to 'The motion in arrest of judgment.' "

"If it had been intended to cut an accused party off from availing himself of the benefits of the motion in arrest merely because he failed to demur or object to the indictment in limine where the indictment is substantially defective, the inclusion in the Code of those provisions relating to motions in arrest was a vain and useless formality, tending only to confuse."³⁴

Is that conclusion sound? One can determine the purpose of Article 284 only in the light of the prior jurisprudence and of the differences in the statutes prevailing at the respective times. The evil of the prior jurisprudence was the product of a long development in the common law. It permitted a defendant to stand by, observe a substantially defective declaration or indictment, and then by motion after verdict, upset the entire proceedings. In recent years, most states have sought to avoid that evil by insisting

33. *State v. Jackson*, 43 La. Ann. 183, 8 So. 440 (1891).

34. *State v. McDonald*, 178 La. 612, 622-623, 623-624, 152 So. 308, 311 (1934).

that objection to pleadings be made at the outset. The evil sought to be avoided is clear; the purpose of such provisions as Article 284 is correspondingly clear.

The surprising fact about the *McDonald* case is that Article 253 *was not even mentioned*. It is difficult to understand such omission because Article 284 simply states the rule categorically; Article 253 elaborates the consequences in detail. Article 253 confers the broadest powers of amendment; it provides for continuance where the defendant has been surprised; for a new jury, if necessary; and it states specifically: "... nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection . . . be made prior to the commencement of the trial . . ."

Returning to the court's assertion in the *McDonald* case that Article 284 must be confined to formal defects, or be a "useless formality," we see the alternative hypothesis, namely, that Articles 284 and 253 require *all* objections to indictments to be urged prior to trial; that *if the objection is taken in such timely fashion*, then the defendant may again raise objections to *substantial* defects by motion in arrest. There is nothing whatever in Articles 517 and 518 which makes it impossible to apply the above limitation upon their operation, that is, that a demurrer or motion to quash must have preceded. It is true that the Code does not expressly assert that, but it is equally true that it does not expressly assert the opposite. The advantages of pursuing the first interpretation are numerous and apparent. How else give effect to the specific language in Articles 284 and 253 which so clearly extend beyond the older statute and jurisprudence? The interpretation here recommended does give them effect. It also gives effect to Articles 517 and 518.³⁵

The obvious conclusion is that it was sought on the one hand to avoid the evil of sharp procedure because of defects in pleading, and on the other hand, to give the trial judge ample opportunity to correct mistakes of pleading. This latter is done by the Code, by provision for arresting judgment. Assuredly it is preferable to give limited application—but important application nonetheless—to Articles 517 and 518 than it is to ignore the plain language of Articles 284 and 253.

35. Art. 418, La. Code of Crim. Proc. of 1928 complicates the problem somewhat; and it would be helpful if the Code had related this article to the others discussed. As it stands, it can be interpreted to mean simply that a (proper) motion is required as regards substantial defects whereas formal ones that go unnoticed are cured by the verdict.

On the other hand, there is no doubt that serious questions remain to be settled. Just how far can the above principles be allowed to operate without unfairness? How defective can pleadings be permitted to be? Some limitations on Article 253 seem to be needed, and it is not possible to do more here than suggest the broad lines of issue. The problem is dismissed in the *Gendusa* case with a sweeping assertion that "to convict a person of a capital crime under an indictment from which an essential averment is omitted constitutes a substantial violation of a constitutional right."³⁶ In one possible and extreme interpretation, that proposition may be valid. But is it valid under the limitations prescribed by Article 253 where provision is made for continuance and discharge of the jury? And the rules as to admissibility of evidence provide an additional check. Consequently, it is difficult to see why the canons as to notice, time for preparation, and fair trial may not be preserved within the framework of a procedure which is designed to prevent taking undue advantage of technical defects. In the *McDonald* case, Justices Rogers and Brunot (who wrote the opinion in the *Williams* case) dissented. And in his concurring opinion in *State v. Wall*, Chief Justice O'Niell wrote:

"In such a case it would be a failure in the administering of justice to set free a defendant whose guilt has been proved in every essential element of the crime charged, after he has silently taken his chance of being forever acquitted of the crime charged. It was to prevent such a failure in the administering of justice that the provisions of article 253 of the Code of Criminal Procedure were adopted."³⁷

Accordingly, since all the discussion in the *Gendusa* opinion, insofar as it bears upon failure to demur or move to quash, is dicta, it is possible to re-examine the question with hope of revision.

Many questions of evidence arose in the cases, and among these, admissibility is perhaps the most commonly involved. And most important here was the question of admission of evidence of ill-repute of, or prior threats made by, the deceased in cases of self defense.

Article 482 of the Code of Criminal Procedure provides:

"In the absence of proof of hostile demonstration or of overt act on the part of the person slain or injured, evidence

36. *State v. Gendusa*, 190 La. 422, 446, 182 So. 559, 567 (1938).

37. *State v. Wall*, 189 La. 653, 669, 180 So. 476, 481 (1938).

of his dangerous character or of his threats against accused is not admissible."

Two cases discuss the issues in detail. In *State v. Thornhill*³⁸ the defendant, a police officer, testified that the deceased advanced upon him despite his order to stop, that he "threw his hands in his pockets," at which time the defendant shot him once, that he then "came out with his gun," and so forth. All of this was denied by bystanders. The court found that the defendant was thoroughly impeached as to his testimony that the deceased drew a pistol. Hence, evidence of an altercation thirty minutes before the shooting and of ill-repute was not admitted. This decision was upheld by the Supreme Court with Chief Justice O'Niell writing a distinguished dissenting opinion.

The position of the Chief Justice is that

"... a person on trial for murder or manslaughter, who pleads that he did the killing in self-defense, should be allowed to introduce evidence of previous threats on the part of the deceased, or of the dangerous character of the deceased, whenever there has been introduced any evidence at all from which the jury might decide that the deceased made a hostile demonstration against the defendant at the moment of the killing."³⁹

His reason is that once *some* evidence is introduced, a question of fact arises which goes to the issue (was the accused the aggressor?) and that it should accordingly go to the jury along with evidence of prior threats or ill-repute of the deceased, since the latter bear upon the question at issue. The learned Justice argues that the majority ruling requires the defendant to prove that the deceased was the aggressor without giving him the benefit of the total relevant situation. But Article 482 requires *proof* of an overt act before *evidence* of prior threats is admissible. Chief Justice O'Niell accordingly argues that "proof" and "evidence" in that context are synonymous, but reliance upon Webster, the sole authority adduced, lends little weight to this argument. If Article 482 were so construed, it could be entirely nullified in its purpose to place some fair limitation upon the admissibility of evidence of prior threats, since the defendant could always testify. Hence, "proof" as used in Article 482 probably means evidence that carries some persuasion. But how much evidence, or what degree of persuasion required, is not stated. The opinion

38. 188 La. 762, 178 So. 343 (1938).

39. 188 La. at 794, 178 So. at 354.

stresses "reasonable ground," and the indications are that some doubt must be raised. In any event, the criticism of the Chief Justice would still be relevant, though not necessarily acceptable.

The same issues were raised in *State v. Stracner*⁴⁰ but under facts much more favorable to the accused, and hence to Chief Justice O'Niell's position. Here the defendant testified to various aggressive acts on the part of the deceased including actual battery, and a 13-year old boy testified that the deceased had a knife in his hand. All of this evidence was contradicted, and the court did not credit it. A further point of importance results from the court's holding that "an overt act is a hostile demonstration of such character as to create in the mind of a reasonable person the belief that he is in immediate danger of losing his life or of suffering great bodily harm."⁴¹ The additional difficulty which this raises results from use of the term "reasonable person." For it is left in doubt as to whether the facts that previous threats were made and that the deceased was a person of vicious character, will be considered by the judge in determining whether the defendant acted reasonably. If such threats are not to be considered for the purpose of determining reasonableness of the defendant's belief that the act was overt, a real hardship is imposed. Yet the usual qualifying words "in the situation of the defendant" are not employed. Certainly it would seem that so far as the trial judge is concerned, for the purpose of deciding whether the defendant reasonably believed an overt act was being made, prior threats should be heard. There is some indication to suggest that they were heard. If the trial judge does go into the entire fact-situation, including prior threats, and if on that basis he uses the standard of a reasonable person in the position of the defendant to determine whether an overt act was made, then some benefit is derived by the defendant as regards proof of dangerous aggression at the time of the homicide.

As for the major issue, it is apparent that it concerns a question of policy rather than one of law. Simply because the trial judge passes upon the question to determine admissibility, does not mean that he is not deciding a question of fact, even though those facts and his ruling are reviewable. But it is not uncommon for judges to exercise such a fact-finding function in jury cases. If one adheres to the prevailing view that juries should be protected from certain types of misleading or inflammatory evidence,

40. 190 La. 457, 182 So. 571 (1938).

41. 190 La. at 470, 182 So. at 575.

then the limitation suggested seems reasonable. But the opposite view is quite defensible, and it has been urged to the extent of arguing that no relevant evidence whatever should be kept from the jury. No more is here suggested than that (1) the underlying problem is one of policy and (2) that the existing law (both code and jurisprudence) might well be clarified as to (a) the definition of overt act and (b) the nature of evidence or degree of persuasion required on the part of the trial judge.

An important problem in the administration of any code of procedure concerns the determination of which provisions must be strictly followed, which may be departed from—and to what extent. Three cases in last year's decisions reveal the nature of the difficulties encountered. In *State v. Milton*⁴² the defendant was convicted of murder and sentenced to be hanged. He had moved unsuccessfully to quash the entire jury array on the ground that only three members of the jury commission (together with the clerk) had officiated. Notice had been sent the other two commissioners on the day of the meeting, and there was doubt whether it had been received. Article 176 of the Code states that three members and the clerk constitute a quorum provided all the members shall have been notified. The verdict was set aside with no consideration given to Article 557.⁴³

In *State v. Thornhill*,⁴⁴ after the entire jury had been selected and sworn, the prosecution was permitted to challenge a juror peremptorily—despite Article 358. The court quoted Article 557 and found that no injury had been done to the defendant.

In *State v. Butler*⁴⁵ the defendant was charged with assault by wilful shooting, tried by a jury of five, and convicted as charged. After four jurors had been accepted and sworn, defendant's counsel noticed that the sheriff was calling the jurors from the list instead of drawing their names by lot from the box. The Supreme Court held that the names should have been drawn by lot and that "there is merit in the argument, that serious injustice

42. 188 La. 423, 177 So. 260 (1937).

43. Art. 557, La. Code of Crim. Proc. of 1928: "No judgment shall be set aside, or a new trial granted by any appellate court of this State, in any criminal case, on the grounds of misdirection of the jury or the improper admission or rejection of evidence, or as to error of any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right."

44. 188 La. 762, 178 So. 343 (1938), cited *supra* note 38.

45. 190 La. 383, 182 So. 546 (1938).

may result, either to the State or to a defendant, from the practice of permitting the sheriff to call the names of the jurors from the list . . ."⁴⁶ Yet it found that defendant had suffered no injury.⁴⁷

In *State v. Gunter*⁴⁸ the defendant was convicted of manslaughter. He had moved to quash the indictment on the ground that one of the grand jurors had a felony charge pending against him—disqualifying him under Article 172. This grand juror had been convicted of a felony in 1905. The conviction had been set aside and the case remanded. It had rested on the dead docket for thirty-three years until it was nolle prossed when defendant moved to quash the indictment. The grand juror had lived in Rapides parish all those years and had exercised all rights of citizenship. Article 8 of the Code of Criminal Procedure directs the district attorney to nolle prosequere a felony charge when six years have elapsed from the finding of the indictment. The Supreme Court held that the grand juror was disqualified, reversed the conviction and declared the indictment void.

It will be noted in the above cases that where the penalty is severe, there seems to be a tendency to apply Article 557 more readily than otherwise. Yet such commendable motivation does not result in a clearer understanding of this article. What is needed is an analysis of the different types of mandate in order to determine from the nature of the various situations, purposes and policies, which provisions must be strictly applied regardless of lack of proof of injury, and which ones may be departed from unless there is injury.

Finally, perhaps a few remarks may be permitted regarding the form of the opinions. Some of them would be a credit to the jurisprudence of any state. But many of the opinions suffer from lack of analysis of the various principles involved. There is a tendency to settle issues by reference to authority, when that authority itself was not the outcome of a reasoned discourse or where it rests upon quite different facts. And it seems to be the custom to discuss each and every point raised in the Bill of Exceptions regardless of its merit, with the result that the opinions are disjointed and, so far as future adjudication is concerned, much less helpful than they might be. Lawyers, of course, like to

46. 190 La. at 389, 182 So. at 548.

47. Another reason for affirming the judgment was that defendant accepted the first four jurors, though his challenges were not exhausted.

48. 188 La. 314, 177 So. 60 (1937).

have each point passed upon; but the court owes a duty not only in the case before it, but also as regards the construction of a sound jurisprudence. A very brief disposition of points of little or no merit would permit more detailed and carefully written analysis of the fundamental issues. Certainly it would seem that this would greatly improve the jurisprudence—which, so far as criminal law and procedure are concerned, is much to be desired.

VI. PUBLIC LAW

A. CONSTITUTIONAL LAW

Of the many statutes whose constitutionality was challenged in the Supreme Court during the last term, only one was invalidated. This was a relatively minor act that imposed certain restrictions upon trapping.¹ And the legislation here was set aside not because of any lack of power in the legislature but because the act, being a "local or special law," had not been preceded by proper publication.

Most of the major constitutional guaranties were under review; due process, equal protection of the laws, obligation of contracts, right to pursue a lawful calling, and many of the various safeguards available to the accused in a criminal prosecution. In addition, many specific provisions of the Louisiana Constitution were invoked. It is indeed noteworthy that in all these instances, save one, the large number of statutes under attack survived.

Price Fixing. Without doubt, the most important constitutional issue considered by the Supreme Court during the past term was raised in the case of *Board of Barber Examiners of Louisiana v. Parker*.² This decision established the right of the State to fix minimum prices for barbering services. Act 48 of 1936,³ after a long declaration of policy affirming the close connection between barbershop prices and the public health, proceeded in section 12 to charge the Board of Barber Examiners with the duty of approving and establishing minimum price agreements submitted by any organized groups of at least 75 per cent of the barbers of each Judicial District.

Before promulgating such agreements, the Board was di-

1. La. Act 130 of 1936 [Dart's Stats. (Supp. 1937) §§ 2974.1-2974.3], held unconstitutional in *State v. Clement*, 188 La. 923, 178 So. 493 (1938) and in *State v. Tabor*, 189 La. 253, 179 So. 306 (1938).

2. 190 La. 214, 182 So. 485 (1938), noted in (1938) 1 LOUISIANA LAW REVIEW 218, and in (1938) 13 Tulane L. Rev. 144.

3. Dart's Stats. (Supp. 1938) §§ 9389.1-9389.15.

rected to satisfy itself that the prices agreed upon were such as would best "enable the barbers to furnish modern and healthful services and appliances so as to minimize the danger to the public health incident to such work." The assumption upon which the statute is based, therefore, is that under-paid barbers menace public health and safety because they are not "well-nourished, strong and healthy persons" and because they cannot purchase the "sanitary products so necessary in the operation of their business." Presumably, the moral is that an under-nourished barber wields a shaky razor; and that cleanliness, while next to godliness, is not without its relation to finances.

On original hearing, the court decided that the statute was an unconstitutional invasion of liberty of contract and a denial of due process of law. On rehearing, the statute was declared constitutional. In its declaration of policy the act purports to regulate prices, not in the interests of economic well-being, but solely for the protection of public health. This lengthy legislative declaration of policy, or "wailing preamble" as it is often called, moved the Chief Justice to make the following remarks:

"The profuse protestations . . . in the preamble or first section of this statute,—which is quoted at length in the prevailing opinion in this case,—demonstrate to my mind that the author of the statute realized how hard it would be to convince the courts that the real purpose of the statute was to protect the public health or promote the general welfare. And so I say, with great respect, that the preamble, or first section, of this statute, 'doth protest too much, methinks.'"⁴

It is difficult to understand why legislatures should be compelled to insert extended declarations of policy in statutes whose constitutionality is in doubt. Such preambles, in theory at least, are totally unnecessary since the legislation must stand or fall on the constitutional power of the legislature quite apart from the avowed motive which induced enactment. The canon of constitutional construction which enjoins the court to sustain a statute, if any provision of the fundamental document is strong enough to support it, should be sufficient. It is the business of counsel to bring to the attention of the court, in the course of actual litigation and in a proper case, such evidences of constitutionality as suggest themselves. It is not desirable that the legislature make a bogus "legislative" finding of facts as a preliminary to law-

4. 190 La. at 304, 182 So. at 514.

making. Such legislative fact-finding is neither necessary nor proper. In point of fact, it is highly doubtful whether "wailing preambles" do any good. Both the NIRA⁵ and the Bituminous Coal Conservation Act⁶ contained these superfluous obeisances to supposed judicial truculence—in vain.

The preamble thus necessitated a narrow consideration of the case. It was felt that the only inquiry properly before the court was the relation of barbering prices to *public health*. The more important question as to whether the legislature could have set minimum prices in the interests of economic advantage, as a means of restricting unfair or ruinous competition, was therefore not in issue. It is unfortunate that this was so, because the outcome of the decision, while significant in itself as countenancing price-fixing, does not encompass the general right of the legislature to fix prices in an endeavor to ameliorate economic conditions which have only a problematical and not a direct bearing upon public health or safety.

Those justices who voted to uphold the barber statute relied heavily on the celebrated case of *Nebbia v. New York*⁷ which sustained a statute regulating prices of milk. It will be recalled that in the *Nebbia* case, the Supreme Court of the United States departed from the old limitation which restricted price-fixing to "businesses affected with a public interest." Price-fixing was there regarded as a legitimate means of effecting general legislative purposes regardless of the nature of the business regulated.

The barber case, therefore, takes its place among a whole host of decisions upholding price-fixing statutes as health measures⁸—most of them obvious camouflages for out-and-out price regulation of private business. It would have been well if this issue could have been fought out in the open, so to speak. The health fiction resorted to in the barber legislation is certainly disingenuous in the last degree. If the legislature had seen fit to risk a trial of strength on the point of regulating barber prices as a means of assuring a decent livelihood to barbers, the decision would have

5. Act of June 16, 1933, c. 90, 48 Stat. 196 (1933), 15 U.S.C.A. § 701 (Supp. 1938), Title I of which was invalidated by *Schechter Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947 (1935).

6. Act of Aug. 30, 1935, c. 824, 49 Stat. 991 (1935), 15 U.S.C.A. §§ 801-827 (Supp. 1935), invalidated by *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1935). This act was repealed by Act of April 26, 1937, c. 127, § 20 (a), 50 Stat. 90 (1937).

7. 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469 (1934).

8. See collection of cases in Note, (1938) 1 LOUISIANA LAW REVIEW 218; *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469 (1934).

been momentous as a prototype of one of the main constitutional issues involved in the federal Fair Labor Standards Act.⁹

The dissent of the Chief Justice, eminently readable as always, centers about a general distrust of price-fixing. The sentiment which constrained him to write his dissent is perhaps best expressed in the words of Justice Roberts in the majority opinion in the *Nebbia* case: "The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself."¹⁰

Slum Clearance. In *State ex. rel. Porterie v. Housing Authority of New Orleans*¹¹ the constitutionality of Act 275 of 1936¹² was upheld. This statute provided for the creation of slum clearance authorities in cities whose population exceeds 20,000. All powers normally incident to such bodies politic were granted to the Authorities.

The present suit was a test case brought by the Attorney General to determine the constitutionality of the act. This device, precluding the possibility of a constitutional set-back for the enterprises perhaps in a late stage of their development, has all the advantage of declaratory judgment proceedings. Its defect is that the occasions upon which it can be utilized are of course severely limited.¹³

It would be risking little to say that all the constitutional issues likely to arise from the Slum Clearance Act were set at rest by this decision.¹⁴ The relator was astute to bring to the attention of the court every conceivable objection to the statute, and all of them were resolved against him. It was held, in the main, that slum clearance was such a public purpose or public use as would justify the expenditure of public funds and the expropriation of public property; that the bonds, notes and other

9. Act of June 25, 1938, c. 676, 52 Stat. 1060 (1938), 29 U.S.C.A. §§ 201-219 (Supp. 1938).

10. 291 U.S. at 532, 54 S.Ct. at 514, 78 L.Ed. at 954, 89 A.L.R. at 1480.

11. 190 La. 710, 182 So. 725 (1938), noted in (1938) 1 LOUISIANA LAW REVIEW 221.

12. The Housing Authorities Law [Dart's Stats. (Supp. 1938) §§ 6280.1-6280.28].

13. Flory and McMahon, The New Federal Rules and Louisiana Practice (1938) 1 LOUISIANA LAW REVIEW 45, 74.

14. In this connection, however, it might be asked why the case was not carried to the Supreme Court of the United States.

obligations of the Authorities might be exempted from taxation; that no unconstitutional delegation of legislative or judicial powers had been attempted by the act; that the act was properly passed, approved, and promulgated; that the act was not invalid as local or special legislation, and did not include more than the one object which is embraced in its title.

In holding that private property may be expropriated for slum clearance, the court rejected the limitation that such property must be taken for actual use of the general public. The public advantage flowing from slum eradication, and from adequate and sanitary dwellings for actual or potential slum residents was deemed sufficient to constitute a public use. It may be argued that the existence of urban slums in Louisiana is not widespread; but it is undeniable that where they do exist, they constitute a grave social menace.

Freedom of Contract. An ordinance of the City of Shreveport declared uninvited visits to private residences by peddlers, solicitors or itinerant merchants a nuisance and punishable as a misdemeanor. Certain vendors of products in daily use were exempt. The court found that the ordinance was within the legislative power of the city and was free from formal invalidity. *City of Shreveport v. Cunningham*.¹⁵ On the constitutional issues of the case, it was held that discriminating against hawkers and peddlers was not arbitrary class legislation and that declaring their activities a nuisance did not deny them liberty of contract.

There is no doubt that itinerant hawkers and peddlers may be treated as a "class" for regulatory purposes without a denial of equal protection of the laws. The authorities cited by the court amply sustain this proposition. On the principal constitutional point of the case, liberty of contract, or perhaps more specifically, the right to pursue a lawful calling, the opinion is less satisfactory. No authorities, save a former decision of the court on a collateral matter,¹⁶ are referred to. The business of door-to-door peddling, while doubtless annoying at times, is generally regarded as a legitimate occupation. In some instances, the ramifications of the industry are nationwide, and while its proper regulation is imperative, its total suppression is a serious matter. One should not overlook the fact that itinerant solicitors are often subjected

15. 190 La. 481, 182 So. 649 (1938), noted *infra* p. 455.

16. *City of New Orleans v. Schick*, 167 La. 674, 120 So. 47 (1929) (ordinance requiring report to chief of police when moving household and personal effects upheld).

to local harassment not so much because they are "solicitors" as because they are "itinerant." Local businessmen view them with a hostile eye, but it is precisely to prevent unjust discrimination that the right to pursue a lawful calling is protected by the constitutions of the state and the nation. Nonetheless, the United States Circuit Court of Appeals for the Tenth Circuit¹⁷ had before it an ordinance whose main provision is identical with that of the Shreveport ordinance. The court held that the prohibition was a police measure directed in the interests of public safety. The ordinance was upheld on all counts.

Obligation of Contracts. One of the many shifts in governmental reorganization gave rise to the case of *Higginbotham v. City of Baton Rouge*.¹⁸ Here the appellant, on Jan. 10, 1935, was elected Commissioner of Public Parks and Streets for the city of Baton Rouge, for a term ending November, 1936, at a salary of \$5,000.00 per annum. The legislature abolished the office and provided that the incumbent should be employed by the city until the next general election.¹⁹ A city ordinance gave the appellant employment under these terms. Later the legislature repealed the provision relative to the employment of the appellant,²⁰ and the city terminated his employment. The appellant contended, *inter alia*, that this was repugnant to the Constitutions of the United States and of the State of Louisiana as an impairment of the obligation of a contract. The decision was for the City, the court holding that the office was governmental and that the employment under it by the appellant was the tenure of a public office, not a private contract of employment.

On December 5, 1938 the Supreme Court of the United States in preliminary consideration of an appeal in this case noted probable jurisdiction.²¹ At the present writing, the case is on the docket of that court for hearing.²²

Civil Service. Interested citizens and taxpayers attacked the constitutionality of Act 22 of the Second Extra Session of 1934,²³ which purported to create a State Civil Service. The gist of the complaint was that the statute did not in fact establish a civil service system in the usual intendment of that term because,

17. *Town of Green River v. Fuller Brush Co.*, 65 F. (2d) 112 (C.C.A. 10th, 1933).

18. 190 La. 821, 183 So. 168 (1938).

19. La. Act 13 of 1934 (3 E.S.) § 4 (1) [Dart's Stats. (Supp. 1938) § 5451.4].

20. La. Act 1 of 1935 (1 E.S.) § 1 [Dart's Stats. (Supp. 1938) § 5451.4].

21. Dec. 5, 1938, Docket No. 462 (1938), C.C.H. 1750.

22. 59 S. Ct. 245 (1938).

23. Dart's Stats. (Supp. 1938) §§ 9443.1-9443.17.

among other things, it creates no merit system, provides for no competitive examinations, and erects no safeguard against arbitrary action by the appointing officers. The title of the Act, it was claimed, is therefore not indicative of its object, contrary to Article III, section 16 of the Constitution of 1921. The court upheld the statute on the ground that it related to civil service in its "enlarged sense." Mr. Justice Odom, in dissenting, seemed to feel that the sense of the term civil service had been "enlarged" for the occasion. *Ward v. Leche*.²⁴

State Debt. In two cases of importance to the state's financial arrangements, it was held that proposed bond issues were without taint of illegality. In the first case,²⁵ the court held that certain bonds offered for sale by the Board of Liquidation of State Debt did not constitute an increase of the public debt inasmuch as the obligations in question were *refunding* bonds. In the second case,²⁶ the court sustained the validity of bonds issued to finance the building program of the Louisiana State Board of Education.

Dedication. In *Arkansas-Louisiana Gas Co. v. Parker Oil Co.*²⁷ the Supreme Court held that a dedication of public ways under a statute vests title in the public in full ownership and does not merely create a servitude. Hence an act²⁸ which provided that unused ways be deemed abandoned and that title to the land pass to contiguous owners, did not deprive the dedicator of property without due process of law.

Formal Validity of Statutes. The usual quota of cases challenging the formal validity of statutes came before the court at the last term.²⁹ As a rule, such objections are parasitic. They seldom form the sole basis of a constitutional attack, but are generally urged in connection with other more weighty matters. Correspondingly, it does not often happen that mere informality suffices to strike down a statute. If informality is found, it is generally discovered in company with other constitutional infirmities. The

24. 189 La. 113, 179 So. 52 (1938).

25. State ex rel. Porterle, Atty. Gen. v. Board of Liquidation of State Debt, 190 La. 520, 182 So. 661 (1938).

26. State ex rel. Porterle, Atty. Gen. v. Louisiana State Board of Education, 190 La. 565, 182 So. 676 (1938).

27. 190 La. 957, 183 So. 229 (1938).

28. La. Act 151 of 1910 [Dart's Stats. (1932) § 5856].

29. State v. Hill, 188 La. 444, 177 So. 421 (1937); State v. McBrayer, 188 La. 567, 177 So. 669 (1937); State v. O'Brien, 188 La. 584, 177 So. 674 (1937); Ward v. Leche, 189 La. 113, 179 So. 52 (1938); City of Shreveport v. Cunningham, 190 La. 481, 182 So. 649 (1938); State ex rel. Porterle v. Housing Authority of New Orleans, 190 La. 710, 182 So. 725 (1938); Arkansas-Louisiana Gas Co. v. Parker Oil Co., 190 La. 957, 183 So. 229 (1938).

defense of statutory informality was sustained in two cases³⁰ which invalidated Act 130 of 1936 prohibiting certain types of trapping on lands situated less than 150 miles from the Gulf of Mexico. The act here was held to be a "local or special law" which had not been preceded by proper publication.

Criminal Cases. In a number of criminal cases,³¹ unconstitutional action, whether under a statute or not, was charged. It was uniformly held that the conduct attacked was not unconstitutional.

B. TAXATION

People continue to pay taxes reluctantly. Tax litigation, therefore, occupies much of the attention of the Supreme Court. A simplified and understandable system of taxation, whether state or national, is perhaps a pipe dream. Yet it does seem that some order could be introduced into the confusion of tax statutes, tax regulations, methods of assessment, collection, suits, and finally, that *bête-noir* of the conveyancer—the tax sale. Tax litigation is generally a matter of statutory construction and when statutes accumulate, the occasions for ambiguity multiply. The tax cases before the court during the last term amply illustrate this truism.

A tax case which attracted much attention by reason of the assiduity with which it was fought out was *State v. Standard Oil Co. of La.*³² Its manifold issues arose out of the practice whereby the oil companies subject to the severance tax deducted from the amount of oil taxable, a 2 per cent allowance for loss in transporting the oil from the well to the refinery. The state contended that the tax covered 100 per cent of the oil severed from the well. The oil company countered with the defense that executive and administrative construction of the statute, long prior to and during the alleged taxable period, settled the meaning of the statute otherwise.

In preliminary proceedings the Oil Company unsuccessfully entered the following defenses: the summary tax statute is unconstitutional in that it deprives the taxpayer of opportunity to

30. *State v. Clement*, 188 La. 923, 178 So. 493 (1938); *State v. Tabor*, 189 La. 253, 179 So. 306 (1938).

31. *State v. Cass*, 188 La. 606, 177 So. 682 (1937); *State v. Berry*, 188 La. 612, 177 So. 684 (1937); *State v. Pierre*, 189 La. 764, 180 So. 630 (1938), Cert. granted, 59 S. Ct. 100 (1938); *State v. Connally*, 190 La. 175, 182 So. 318 (1938); *State v. Gendusa*, 190 La. 422, 182 So. 559 (1938).

32. 188 La. 973, 178 So. 601 (1938).

make an adequate defense, in that it unfairly casts the burden of proof upon the taxpayer, and in that it takes from him the right of devolutive appeal; the state invoked the wrong remedial statute; and the three year period of limitation applied to the claim. The defendant did not neglect the time-tried defenses that the statute was an unlawful delegation of legislative and judicial power; that a severance tax on a purchaser of oil was a taking of property without due process in violation of the Constitution of the State and of the United States; and that the equal protection clauses of both Constitutions had been flouted.

It was apparent, however, that contemporaneous administrative construction was the principal defense relied on in this complicated law suit. It is not difficult to agree with the Chief Justice (whose dissent was directed solely to this point) that the practice of deducting two per cent was known to and acquiesced in by the legislative and executive branches of the government, and that the doctrine of contemporaneous construction in the interpretation of an ambiguous statute should govern the case. To be sure, to the majority of the court the language of the act was not susceptible of double meaning, and indeed a reading of the terms of the statute supports that stand. There is undoubtedly need for legal procedure by which the hardship resulting from an erroneous construction of a statute by administrative ruling or practice should be eliminated. An administrative ruling which resolves a statutory doubt in favor of a private party puts him in an equivocal position. It would be inhuman to expect him to spurn the advantage; on the other hand, if he accepts it he may be faced with a law-suit in the inconvenient future. The alternative, a suit to test the construction of a statute every time ambiguity seems possible, would stop the wheels of government. This difficulty has been partially met by a constitutional amendment,³³ adopted in 1938, establishing a prescriptive period of three years for such taxes and licenses.³⁴

In a later case against the same defendant, the doctrine of contemporaneous administrative construction was used by the court in favor of the taxpayer. *State v. Standard Oil Co. of La.*³⁵ The statute permitted a three per cent deduction, for lossage, on the total taxable gallonage received by the dealer. An adminis-

33. La. Const. of 1921, Art. VII, § 59.1, as amended in accordance with proposal in La. Act 200 of 1938.

34. Hebert and Lazarus, *The Louisiana Legislation of 1938* (1938) 1 LOUISIANA LAW REVIEW 80, 118.

35. 190 La. 338, 182 So. 531 (1938).

trative ruling decided that this meant a flat deduction of three per cent of total sales, regardless of actual losses. The majority of the court felt that the doctrine of contemporaneous construction should govern the matter in any event. But they went further, and held that the administrative construction was correct. Mr. Justice Higgins, while agreeing that contemporaneous construction in effect estopped the collection of the tax, could not refrain from pointing out that the legislature or the Supervisor of Public Accounts hardly contemplated the situation in which gasoline and oil dealers of the state retain \$300,000.00 annually which they collect as taxes from consumers without any showing of the amount of actual loss suffered.

Tax Titles. A number of cases attacking the validity of tax titles or procedure for redemption of property occupied the attention of the court. One sometimes wonders whether such property is not in effect inalienable within the relevant periods of prescription, because of the excessively complicated nature of tax sales. Simplification of tax sales appears to be an imperative demand.

In *Gayle v. Slicer*³⁶ the court held that erroneous description in the assessment of property, the subject of a tax sale, does not invalidate the sale where the land can be identified by evidence within the assessment.

In *Crawford, Jenkins & Booth v. Wills*³⁷ the defendants, long in actual possession of the land, were surprised to learn of a prior valid tax sale to another. *Laughlin v. Hayes*³⁸ represents an unsuccessful effort to set aside a tax sale by an offer of redemption to the purchaser which would have been effective had not prescription intervened. *Tillery v. Fuller*³⁹ and *Johnson v. Chapman*⁴⁰ were complicated proceedings involving tax titles.

Of some interest is the holding in *State v. City of New Orleans*⁴¹ which ruled that redemption of property adjudicated to the city must proceed according to Act 170 of 1898, section 62, as amended by Act 175 of 1934.⁴² The city cannot be compelled to accept tender of back taxes.

Assessments. A disgruntled land owner attacked the consti-

36. 188 La. 940, 178 So. 498 (1938).

37. 188 La. 366, 179 So. 455 (1938).

38. 189 La. 707, 180 So. 494 (1938).

39. 190 La. 586, 182 So. 683 (1938). See also at p. 358, *supra*.

40. 190 La. 1034, 183 So. 285 (1938).

41. 190 La. 208, 182 So. 329 (1938).

42. Dart's Stats. (Supp. 1938) § 8466.

tutionality of both front foot rule and square foot rule for fixing paving assessments. Needless to say, the attack was unsuccessful. It does seem, however, that legislative ingenuity could devise some more equitable method of levying assessments than those rough and ready mechanical rules. *Hagmann v. City of New Orleans*.⁴³ *Hinkle v. McGuire*⁴⁴ represents an unsuccessful suit to subject certain property to a lien for street paving.

Licenses. Echoes of the current agitation for abolition of intergovernmental immunity from taxation⁴⁵ were heard in two cases. In *State v. Whitney National Bank*⁴⁶ the defendant national bank operated buildings having fourteen, seven, four and two stories respectively. It used for banking purposes four stories of the 14-story building and one story of each of the others. The court dismissed without scruple the fantastic claim that all four buildings should be entirely exempt from license tax even on the portion not used for banking purposes since the bank was authorized by federal law to provide for future expansion. In *State v. Oberle*⁴⁷ a customhouse broker, licensed by the Federal Treasury Department, was held not to be an agent or instrumentality of the federal government so as to be exempt from a state occupational tax.⁴⁸

The perennial Chain Store License Tax fight entered what appears to be its last round in *State v. Great Atlantic & Pacific Tea Co.*⁴⁹ Here the taxpayer assailed as unconstitutional the attempt of the state to collect interest and attorneys' fees under the Chain Store License Tax, particularly because prior to the due date of the tax the taxpayer had challenged its constitutionality in the federal courts. It was held that the tax was constitutionally levied, and that it was collectible for the period of the pendency of the suit in the federal courts. The abundant reference in the opinion to federal jurisprudence fully sustains these rulings. On October 24, 1938, the Supreme Court of the United States denied certiorari.⁵⁰

A series of miscellaneous tax cases are the following: *State v. DeSoto Securities Co., Inc.*⁵¹ held that a corporation liquidating

43. 190 La. 796, 182 So. 753 (1938).

44. 190 La. 397, 182 So. 551 (1938).

45. See *Helvering v. Gerhardt*, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427 (1938), noted in (1938) 1 LOUISIANA LAW REVIEW 224.

46. 189 La. 221, 179 So. 84 (1938).

47. 190 La. 1053, 183 So. 347 (1938).

48. La. Act 15 of 1934 (3 E.S.) § 17 [Dart's Stats. (Supp. 1938) § 8604].

49. 190 La. 925, 183 So. 219 (1938).

50. 305 U.S. (Preliminary Print) xxii, 59 S.Ct. 108 (1938).

51. 189 La. 285, 179 So. 316 (1938).

its business is not subject to a license tax levied on those "engaged in business"—a conclusion which should startle no one; *State v. Burton Swartz Cypress Co.*⁵² ruled that a domestic corporation, almost all of whose funds are invested in a foreign corporation, must pay a license tax⁵³ based on its entire capital stock, surplus and undivided profits since the statutory exemptions apply only to corporations which (1) do business, in whole or in part, outside of the state, or (2) are parent corporations whose subsidiaries have paid the tax; *State v. Levy*,⁵⁴ held that the proprietor of the shoe repair department in a department store was not to be exempt from the same occupational license tax as a person engaged in mechanical pursuit, despite the fact that at times he repairs shoes; and *State v. Succession of Brewer*,⁵⁵ held that the proceeds of a life insurance policy payable to the estate are not exempt from inheritance tax.

C. PUBLIC UTILITIES

An important and novel point in public utilities law was raised by four cases, later consolidated under the title of *Bradford v. Louisiana Public Service Commission*.⁵⁶ The Commission had granted to the Herrin Motor Lines, Inc. a certificate to operate as a motor carrier between Baton Rouge and New Orleans. Plaintiff, representing competitive interests, claimed that the certificate of convenience and necessity should not have been granted to the Herrin Lines until the existing franchise holders were given an opportunity to provide the additional service which the granting of the new certificate presumed to exist. The court refused to read section 4 of Act 292 of 1926⁵⁷ as requiring that this be done. Without reliance on other authority, the court held that the construction of the statute advanced by the plaintiff was self-contradictory. In addition, it might be said that the statutory inference claimed by the plaintiff would lead to a virtual monopoly in existing franchise holders when the market for transport service is growing, as is evidently the case at present between Baton Rouge and New Orleans. Competitors would thus be admitted only at

52. 190 La. 947, 183 So. 226 (1938).

53. Under La. Act 8 of 1932, § 1 (4) [Dart's Stats. (1932) § 8722].

54. 190 La. 511, 182 So. 659 (1938).

55. 190 La. 810, 182 So. 820 (1938).

56. 189 La. 327, 179 So. 442 (1938). The other three cases are *Bradford v. Louisiana Public Service Commission*, 189 La. 339, 179 So. 446 (1938); *Yazoo & Mississippi Valley R. R. v. Louisiana Public Service Commission*, 189 La. 340, 179 So. 447 (1938); *Id.*, 189 La. 341, 179 So. 447 (1938).

57. Dart's Stats. (1932) § 5313.

the will of the existing franchise holders who would have the right to forestall competition by agreeing to furnish additional service at the Commission's instance.

VII. COMMERCIAL LAW

A. BANKING AND NEGOTIABLE INSTRUMENTS

In the case of *In re Interstate Trust & Banking Co.*,¹ with more than seventy lawyers entering appearances, the Supreme Court had before it for consideration some 69 claims for preferences in the distribution of funds of a defunct New Orleans bank. The appealed claims represented the sizeable remnant of an original total of 98 oppositions to the distribution proposed by the State Bank Commissioner. The court, in one sweep, disposed of 64 of the oppositions by construing the statute regulating the filing of claims by persons other than depositors to mean that any such claim not filed within the time fixed by the State Bank Commissioner should be barred by limitation.² This statute merely provided for publication of notice to creditors to file claims within a time to be fixed by the Bank Commissioner and contained no express provision as to barring the claim.³ It was held to be "the intention of the Legislature . . . that all claimants other than depositors should be required to file and prove their claims within a fixed period of time"⁴ and consequently the failure to comply with the requirement barred such claimants from asserting their claims although the statute lacked a positive provision to this effect. From this ruling the Chief Justice dissented, concurring with the trial judge that the court should not pronounce a forfeiture which the Legislature has not expressly created.

With the bulk of the claims for preferences thus disposed of, the remaining five oppositions were denied for assigned reasons. A New Orleans coffee importer caused the Interstate Trust & Banking Company to issue an irrevocable letter of credit in favor of a Brazilian coffee exporter who was authorized to draw drafts covering the purchase price of coffee. It was agreed that the New Orleans importer was to provide the Bank with funds to meet any draft drawn against the letter of credit at least one day prior to

1. 188 La. 211, 176 So. 1 (1937).

2. Of the 64 claims disposed of in this manner only 6 had been allowed as preferred claims by the trial court after exhaustive consideration of each separate opposition.

3. La. Act 300 of 1910, § 4 [Dart's Stats. (1932) § 700].

4. 188 La. 211, 227, 176 So. 1, 6 (1937).

the maturity of the draft. After sale of the coffee, by check drawn on the Interstate Bank, the importer prepaid by more than two months the amount of the outstanding draft issued against the letter of credit. It was held that neither the importer nor the exporter was entitled to a preference in the distribution.⁵ The court refused to grant an equitable lien on the basis of trust relationship and further held that Act 63 of 1926⁶ does not accord a lien or privilege in this situation.⁷ Similarly, the holder of a draft drawn against a letter of credit under the circumstances outlined above was denied a preference and was classed only as an ordinary creditor of the Bank.⁸

In the *Opposition of Hattiesburg Grocery Company*,⁹ the court again repudiated the *Jones County* case¹⁰ and, affirming the *Pan American Life Insurance Co.* case,¹¹ held that the opponent Grocery Company, which had issued bonds payable at the Interstate Bank, was not entitled to a preference under Act 63 of 1926 for sinking funds on deposit with the Bank as "paying agent." The vigor with which the Chief Justice expressed his dissent from the overruling of the *Jones County* case suggests that this problem will probably receive further attention from the court.

A depositor had received credit in its account on March 1, 1933 for two checks drawn on other New Orleans banks. A privilege was asserted on the ground that the checks were not collected until March 3, 1933 on which date the bank had resumed the 100 per cent status as to deposits made on that date and, in the alternative, opponent asserted a privilege under Act 63 of 1926.¹² Although the checks passed through the New Orleans Clearing House under rules and deposit slip stipulations which would have

5. In re Interstate Trust & Banking Co. (*Opposition of Hickerson and Ornstein*) 188 La. 211, 234, 176 So. 1, 8 (1937).

6. Dart's Stats. (1932) §§ 648-651.

7. Equitable liens are held not to exist in Louisiana because liens and privileges are *stricti juris* and are provided by statute only. See Daugherty v. Canal Bank & Trust Co., 180 La. 1003, 158 So. 366 (1935); Young v. Teutonia Bank & Trust Co., 134 La. 879, 64 So. 806 (1914).

8. In re Interstate Trust & Banking Co. (*Opposition of N. V. Nederlandse Koloniale Handelvereening*) 188 La. 211, 239, 176 So. 1, 10 (1937).

9. 188 La. at 243, 176 So. at 11.

10. In re Liquidation of Hibernia Bank & Trust Company (*Jones County, Intervener*) 181 La. 335, 159 So. 576 (1935). For an exhaustive discussion of the soundness of this case see O'Niell, C.J., dissenting in In re Interstate Trust & Banking Co., 188 La. 211, 255, 176 So. 1, 16 (1937).

11. In re Hibernia Bank & Trust Company (*Pan American Life Insurance Company, Intervener*) 185 La. 448, 169 So. 464 (1936) (overruled the *Jones County* case).

12. In re Interstate Trust & Banking Co. (*Opposition of State Agricultural Credit Corporation, Inc.*) 188 La. 211, 245, 176 So. 1, 12 (1937).

permitted appropriate adjustments on March 2, 1933 if the item had not been finally paid, the court held: "The deposit was absolute and not conditional and the deposit became effective as of March 1, 1933."¹³ Opponent, therefore, assumed the status of a general creditor by virtue of a deposit completed on March 1, 1933 and there was no agency for collection within the provisions of Act 63 of 1926.¹⁴

Another case arising out of the liquidation of the Interstate Trust & Banking Company was that of *Compania Exportadora De Cafe, S. A. v. Banco Nacional De Mexico*.¹⁵ Two drafts drawn by the plaintiff payable to its own order were discounted on February 1, 1933 with the Interstate Bank prior to the banking holiday. The Interstate Bank was directed by the plaintiff to remit the proceeds of the drafts to the defendant bank with which plaintiff maintained an account as depositor. Unknown to the plaintiff, there existed an agreement between the defendant depositary bank and the Interstate Bank whereby the latter was authorized to credit defendant's account in such transactions instead of making a direct remittance. Pursuant to this agreement, as had been done in other instances, the Interstate Bank notified the plaintiff that remittance had been made to defendant bank although in effect it had merely credited the account of the defendant depositary bank without actually making remittance. After the banking holiday the Interstate Bank operated on a restricted basis and was later placed in liquidation and the defendant therefore refused to honor the credit asserted by the plaintiff on the ground that the proceeds had not been received by the defendant and that immediate notice of credit had not been sent. In the plaintiff's action, as depositor, to recover the amount of these two items, it was held that the transaction between the plaintiff and defendant was such as to create the relationship of creditor and debtor respectively, and that the action of the intermediary Interstate Bank, in crediting defendant's account pursuant to the agreement with the defendant consummated the deposit.

13. 188 La. at 251, 176 So. at 14.

14. See *In re Liquidation of Canal Bank & Trust Company* (Intervention of Clark & Company) 181 La. 856, 160 So. 609 (1935) and *In re Liquidation of Hibernia Bank & Trust Co.* (Intervention of Progressive Investment Company, Inc.) 182 La. 856, 162 So. 644 (1935), also holding that where a check is indorsed without restriction and deposited with a stipulation in the deposit slip that the bank is acting as agent and reserves the right to charge the check back if unpaid, the giving of an immediate though conditional credit, creates the relation of debtor and creditor and the depositor is not a privileged creditor of the bank for the amount of the check so deposited.

15. 188 La. 875, 178 So. 381 (1938).

Although, as a general proposition, it is clear that a bank is not liable for the amount of a credit given for a deposit when in fact no deposit is actually made with the depository bank,¹⁶ yet the decision reached in the *Compania* case seems entirely sound in the light of the facts found by the court. Under the circumstances of this case, the entries that were made appeared sufficient to create simultaneously the relation of depositor and bank between plaintiff and defendant and a similar relationship between the defendant and the Interstate Bank so that the loss occasioned by the latter's closing should be borne by the defendant bank and not by the plaintiff.

In *Williams v. DeSoto Bank & Trust Co.*¹⁷ it was decided that the liquidation and dissolution of a bank under the applicable banking regulatory statute,¹⁸ terminated its legal existence and released such bank by operation of law from further liability as guarantor to the plaintiffs. Under these circumstances plaintiff need not make any express reservation of his rights as against such bank in order to hold other co-debtors *in solido* liable.

The intervention of D. H. Holmes Co., Ltd., *In re Liquidation of the Hibernia Bank & Trust Co.*,¹⁹ raises for consideration the extent of the application of the issues of the *Wainer* case²⁰ and poses the problem of the status of facultative compensation in the civil law of Louisiana.²¹ The D. H. Holmes Company contended that its note for \$100,000.00 dated March 13, 1933 payable on June 12, 1933, should be declared extinguished by compensation by virtue of a deposit to its credit on the books of the Hibernia Bank.²² Since the note in question matured after May 20, 1933 (the date on which the State Bank Commissioner took over the assets of the Hibernia Bank for liquidation) the doctrine of facultative compensation, approved in the *Wainer* case, was invoked by reason of a letter written by the Holmes Company on April 3, 1933, requesting that the note be offset against its frozen account. It was contended that the letter of April 3rd operated as a waiver of a term in favor of the debtor under Article 2053 of the Civil Code; that by bringing about the maturity of the obligation the obsta-

16. See *American Nat. Ins. Co. v. Marine Bank & Trust Co.*, 167 La. 153, 118 So. 871 (1928).

17. 189 La. 245, 179 So. 303 (1938).

18. La. Act 300 of 1910 [Dart's Stats. (1932) §§ 697-706].

19. *In re Liquidation of Hibernia Bank & Trust Co.* (In re Intervention of D. H. Holmes Co., Ltd.) 189 La. 813, 180 So. 646 (1938).

20. *In re Canal Bank & Trust Co.* (Intervention of Wainer) 178 La. 961, 152 So. 578 (1934).

21. See Comment (1934) 8 Tulane L. Rev. 423.

22. Arts. 2207, 2208, 2209, La. Civil Code of 1870.

cle to compensation was removed and the obligations were "equally liquidated and demandable" within the meaning of Article 2208 of the Civil Code. The court rejected these contentions, taking the view that intervenor's rights became fixed from the time that the bank went into liquidation. Facultative compensation was not allowed, because it was held that the term stipulated in negotiable instruments is in favor of both debtor and creditor.

It is interesting to note that this decision made no attempt to distinguish the *Wainer* case and did not refer to the absence of a finding of "insolvency" which was stressed in the *Wainer* case and was equally absent in the *Holmes Intervention*. The case is illustrative of the tendency of the court to eliminate preferential treatment in the settlement of the affairs of banks in liquidation. This obvious trend suggests that the doctrine of the *Wainer* case may possibly receive still further limitations in its application and a bold prophet might even predict the ultimate triumph of the full implications of *People's Bank in Liquidation v. Mississippi & Lafourche Drainage District*.²³

In *Brock v. Citizens State Bank & Trust Co.*²⁴ the Supreme Court reversed two decisions of the Court of Appeal, Second Circuit,²⁵ and refused to grant a privilege on the assets of a defunct bank to secure the payment of moneys deposited by the bank as the financial tutor of two minors. Act 63 of 1926 was construed as not applying to any situation other than an agency for collection.²⁶ The additional factors present in this case, showing that the bank had failed to invest the minor's funds properly, and that the bank as financial tutor had originally received the money in the form of checks, did not bring the case within the application of the statute. The claims of the minors were consequently listed as ordinary claims. The court considered that the instant case was covered by the earlier re-examinations of the statute in the *Pan American Life Insurance Co.* case²⁷ and in *In re Liquidation*

23. 141 La. 1009, 76 So. 179 (1917). The court has consistently refused to overrule the *People's Bank* case. In the *Wainer* case O'Niell, C. J., concurred in the result but stated that the *People's Bank* case should be overruled. See also *Brock v. Pan American Petroleum Corporation*, 186 La. 607, 173 So. 121 (1937).

24. 190 La. 572, 182 So. 679 (1938).

25. 172 So. 546 (La. App. 1937); 180 So. 650 (La. App. 1938).

26. For a criticism of the policy involved in La. Act 63 of 1926, see Townsend, *The Bank Collection Code of the American Bankers' Association* (1934) 8 *Tulane L. Rev.* 376, 378.

27. *In re Hibernia Bank & Trust Co.* (Pan American Life Insurance Co., Intervener), 185 La. 448, 169 So. 464 (1936), overruling *In re Liquidation of Hibernia Bank & Trust Co.* (Jones County, Intervener), 181 La. 335, 159 So. 576 (1935).

of the *Interstate Trust & Savings Bank*.²⁸ The case further illustrates the general policy of protecting the general depositors through eliminating claims of "equitable liens" on the assets of insolvent banks.

Only one case of importance involving interpretation of the Negotiable Instruments Law was considered by the court. In *Bank of St. John v. Hibernia Bank & Trust Co.*²⁹ the plaintiff executed two demand notes for \$10,000 each dated August 31, 1932 and September 29, 1932 respectively. Both notes were pledged to the Reconstruction Finance Corporation as collateral security for loans made to the Hibernia Bank. The first note was pledged 93 days after its execution and the second 25 days after its execution. It was held that this constituted negotiation of demand paper within a "reasonable time" under the "facts and circumstances of the case," so that the transferee was to be considered as a holder in due course of the notes at the time the Hibernia Bank went into liquidation. The instant decision is an unquestionably sound interpretation of the applicable statutory provisions.³⁰

B. BANKRUPTCY

Only two controversies arising out of bankruptcy proceedings came before the court during the last term. In *Plauche v. Streater Investment Corporation*³¹ a trustee in bankruptcy brought a plenary suit, based on provisions of the Bankruptcy Act,³² against a "family corporation" owned by the bankrupt. The trustee was seeking to obtain possession of realty transferred to the corporation by the bankrupt in return for stock. To this suit a plea of *res judicata* was sustained because of a prior Supreme Court decision in the action of a judgment creditor against the bankrupt debtor and the same corporate defendant.³³ In the earlier case, mortgages executed by the bankrupt before the sale to the corporation and mortgages executed by the corporation after the sale, all in favor of innocent parties, were recognized as valid incumbrances against the property. Accordingly, the court had declined to place

28. 188 La. 211, 176 So. 1 (1937).

29. 189 La. 2, 179 So. 15 (1938).

30. La. Act 64 of 1904 (Uniform Negotiable Instruments Law) §§ 53, 193, 59 [Dart's Stats. (1932) §§ 842, 983, 848].

31. 189 La. 785, 180 So. 637 (1938).

32. The Bankruptcy Act, § 70(a5), 30 Stat. 565 (1898) as amended by 44 Stat. 667 (1926), 11 U.S.C.A. § 110(a5) (Supp. 1937). [The entire Bankruptcy Act was amended by the Chandler Act, 52 Stat. 840 (1938), 11 U.S.C.A. §§ 1-1103 (Supp. 1938).]

33. *Alliance Trust Company, Ltd. v. Streater and Streater Investment Corporation*, 182 La. 102, 161 So. 168 (1935).

the property in the bankrupt's name, but did authorize its seizure and sale for satisfaction of rights of judgment creditors, subject however, to the innocent mortgage creditors' rights. The instant case, interpreting the earlier decision, held that the prior rejection of the revocatory action was *res judicata* to the trustee's suit. *Bass v. Bishop*³⁴ was a suit brought by a trustee in bankruptcy to set aside a mortgage executed by the bankrupt. It was alleged that a mortgage executed by the bankrupt while insolvent, a few days prior to the bankruptcy petition, was fraudulent and constituted an attempt to grant an unfair preference to one of his creditors over others, that the consideration was grossly inadequate, and that the mortgagee knew that the bankrupt was insolvent. The court held that the petition stated a cause of action.³⁵

C. CORPORATIONS

With the present policy of encouraging various industries to locate in Louisiana, and the increase in the number of corporate charters, it has naturally followed that corporate transactions involving potential litigation have increased in number and importance. The fact that only seven cases presenting questions of corporation law have been decided by the Supreme Court during the 1937-38 term, stands as a mute testimonial to the clarity and careful draftsmanship of the Louisiana Business Corporations Law of 1928 and other related statutes.

In the case of *Allardyce v. Abrahams*³⁶ a corporation had executed a note secured by a mortgage note payable to the corporation. When the creditor demanded payment the president and general manager paid the balance due out of his personal funds and received the corporate note and collateral note. The trial court's finding of fact, sustained by the evidence, was that the officer intended a purchase of the corporate obligation rather than a gratuitous payment of the debt, and that he acted in entire good faith and in the interest of the corporation. After suggesting that "It was optional with the corporation if its officers felt that it was injured or damaged, to request that the transaction be set aside as being voidable,"³⁷ the court very properly held that the corpora-

34. 190 La. 392, 182 So. 549 (1938).

35. Arts. 3359, 3360, La. Civil Code of 1870; Rev. Stats. of 1870, § 1808 [Dart's Stats. (1932) § 2118]; The Bankruptcy Act, §§ 60(b) [30 Stat. 562 (1898), as amended by 44 Stat. 666 (1926)], 67(e) [30 Stat. 564 (1898), as amended by 48 Stat. 924 (1934)], 11 U.S.C.A. §§ 96(b), 107(e) (Supp. 1937).

36. 190 La. 686, 182 So. 717 (1938).

37. 190 La. at 693, 182 So. at 719.

tion could not keep the benefit of the transaction and reject the burdens. Thus it could not have the transaction set aside without tendering or offering to reimburse the officer for the money paid out of his personal funds to the corporate creditor.

The facts in the instant case show that the corporation was protected rather than damaged by the purchase of its note. The purchasing officer stood to gain nothing, except to protect his subordinate interest as an officer, and probably a substantial shareholder, by helping the corporation out of financial difficulty with an insistent creditor. Thus there was certainly no breach of the officer's fiduciary relation to the corporation and the transaction was entirely valid,³⁸ rather than voidable as suggested by way of dictum by the court.³⁹

Section 39 of the 1928 Business Corporations Law⁴⁰ imposes the mandatory duty on certain officials to make an annual report to the Secretary of State containing information therein required; and also upon the request of any shareholder of record, to send him a properly verified copy of such report. If such report is not furnished within fifteen days after request, the shareholder may recover \$50.00 from the officers for every day of delay. In *Tichenor v. Tichenor*⁴¹ a shareholder sued the president of a corporation to recover \$4,500.00 in penalties under Section 39. The president had sent a report containing all necessary information but through oversight had failed to sign or verify the report as required by the statute. The shareholder had obviously refrained from pointing out the defect in order to recover the penalties. In affirming the lower court's judgment for the president, the court declared that Section 39 was enacted "primarily to protect the investing public" and not "to penalize an officer who, acting in good faith, mailed an honest and accurate report, but through oversight failed to sign or verify the same."⁴² The decision was a logical application of the doctrine that "statutes imposing penalties must be strictly construed and every doubt must be resolved against the imposition of the penalty."⁴³

In State ex rel Equitable Securities Corporation of Nashville

38. *Stevens v. Laub*, 38 Wyo. 182, 265 Pac. 453 (1928) (directors allowed to sue on corporate note they had acquired by paying the creditor); *Scott v. Norton Hardware Co.*, 54 F. (2d) 1047 (C.C.A. 4th, 1932) (directors subrogated to rights of creditors paid).

39. 190 La. 686, 693, 182 So. 717, 719 (1938).

40. La. Act 250 of 1928, § 39 [Dart's Stats. (1932) § 1119].

41. 190 La. 77, 181 So. 863 (1938).

42. 190 La. at 83, 181 So. at 865.

43. 190 La. at 83, 181 So. at 864-865.

v. Conway, Secretary of State,⁴⁴ a mandamus was issued to compel the Secretary of State to issue a certificate to do business in Louisiana to a Tennessee corporation, the "Equitable Securities Corporation." It was held that by adding the term "of Nashville" to its name, the petitioning corporation had met the requirements of the Louisiana statute⁴⁵ and had sufficiently *distinguished* itself from the "Equitable Securities Company, Inc.," a domestic corporation already doing business in the state. Courts in other jurisdictions have held that the duty of issuing the certificate is discretionary rather than ministerial, and that where the designated officer has concluded that the name in question is not sufficiently distinguished the court should not interfere except on a showing of arbitrary abuse of discretion.⁴⁶ In the instant case the court may have felt that the withholding of the certificate was arbitrary in view of the fact, stressed in the decision, that the two corporations were not competitors and that no injury to the domestic corporation could be presumed.⁴⁷ Again, it appears from the language of the court that the Louisiana statute is being interpreted as imposing a purely ministerial duty, with the result that the court may substitute its judgment for that of the Secretary of State on the question of whether the names are sufficiently distinguished.

Suit was brought in *R. J. Brown Company v. Grosjean*⁴⁸ by a foreign corporation which maintained no local office but had, over the period of a year, purchased 442,501 gallons of petroleum products in the state and sold the same to 48 different Louisiana purchasers. The plaintiff corporation was held to have transacted "a substantial part of its ordinary business" within the state,⁴⁹ and was therefore precluded from bringing suit by Act 8

44. 189 La. 272, 179 So. 312 (1938).

45. La. Act 120 of 1920, § 1 (amending and re-enacting La. Act 267 of 1914, § 23) [Dart's Stats. (1932) § 1246]. The statute expressly forbids the issuance of a certificate to do business to a foreign corporation with a name deceptively similar to that of a corporation already authorized, unless such foreign corporation shall add some term to properly distinguish its name.

46. *Horowitz v. Beamish*, 323 Pa. 273, 185 Atl. 760 (1936) (mandamus refused where the Secretary of State had refused to issue a certificate to the "Keystone State Moving Picture Operators' Ass'n" on the ground that the name was deceptively similar to "Keystone Theatrical Stage Employees and Motion Picture Machine Operators Union, Inc."); *Brooks Clothing of California, Ltd. v. Flynn*, 232 App. Div. 346, 250 N. Y. Supp. 69 (1931).

47. The necessity of probable injury was stressed in *Central Mutual Auto Ins. Co. v. Central Mutual Ins. Co.*, 275 Mich. 554, 267 N.W. 733 (1936).

48. 189 La. 778, 180 So. 634 (1938).

49. *Cf. Norm Advertising, Inc. v. Parker*, 172 So. 586 (La. App. 1937) where a foreign corporation merely had traveling agents who solicited orders which were forwarded to the New York office for acceptance and the neces-

of the Third Extra Session of 1935.⁵⁰ This statute denies a foreign corporation "doing business in this state" the right to sue in any Louisiana court unless it has duly qualified to do business in the state, and has paid all taxes, excises and licenses due the state.

In *Shreveport Long Leaf Lumber Co. v. Jones*⁵¹ it was held that a domestic corporation could bring suit on a note without alleging payment of its franchise tax. The court declared that the act levying an annual franchise tax on all corporations did not state or intimate "that the payment of the tax is a condition precedent to the corporation's engaging or continuing to engage in business," but was "a revenue act pure and simple."⁵²

*General Motors Truck Co. v. Caddo Transfer & Warehouse Co., Inc.*⁵³ deals with the compensation of a corporate receiver. Where \$1,000.00 had already been allowed, the claim for an additional fee of \$1,500.00, out of a fund of \$14,523.65 which he proposed to distribute, was rejected because of his mismanagement and neglect of the receivership affairs.

Act 159 of 1898, Section 10⁵⁴ provides that when, "on the application of any party at interest," it is made to appear that the property cannot be so administered as to pay the debts and restore possession to the corporation, the receivership may be ordered dissolved, the corporate property sold and the assets distributed. The court held in *In re Geo. D. Geddes Undertaking & Embalming Co., Ltd.*⁵⁵ that a stockholder-creditor had a sufficient "interest" to appeal from a judgment dismissing a rule to sell and distribute the corporate assets, even though the funds realized would probably be completely absorbed by claims prior in rank and no pecuniary gain would accrue to him.

An interesting question, relating to the administration of a corporation's affairs by trustees for the benefit of creditors, was presented in *Vincent v. Farmers Bank & Trust Co.*⁵⁶ The Iota Rice Milling Company was heavily indebted. When its mill was destroyed by fire, it entered into an agreement with its creditors, whereby trustees were appointed to administer the affairs of the company and pay its debts. The agreement expressly provided

sary materials were mailed to the Louisiana contracting party, was held not to be "doing business" in the state.

50. Dart's Stats. (Supp. 1937) § 1247.1.

51. 188 La. 519, 177 So. 593 (1937).

52. 188 La. at 526, 177 So. at 595.

53. 189 La. 529, 17 So. 843 (1938).

54. Dart's Stats. (1932) § 1218.

55. 188 La. 366, 177 So. 240 (1937).

56. 189 La. 1073, 181 So. 540 (1938).

that the trustees, in paying out moneys collected, should only pay secured creditors in proportion to the part of their debts which was *unsecured*; and that no distribution should be made until such unsecured amounts were definitely ascertained. The trustees collected \$100,000 insurance money for loss of the building and machinery. Banking conditions were uncertain, so rather than run the risk that the money would be frozen in the bank, they immediately distributed dividends of 50 per cent and 15 per cent to *all* creditors, including a payment to the defendant of \$6,500.00. The defendant, whose claim of \$10,000.00 was secured by a pledge of warehouse receipts on certain rice in the mill, subsequently received a payment of over \$4,000.00 in an interpleader proceeding instituted by the companies which had insured the rice. The trustees then brought this action to recover their overpayment to defendant. (His dividend had been based upon the entire \$10,000.00 debt, rather than upon the unsecured portion thereof.) Judgment for the plaintiff was affirmed on the theory that the dividends were declared by the trustees as "mere tentative payments," and that such procedure was justified by the unsettled banking conditions. The court emphasized the fact that the defendant was a party to the agreement, and also relied on the general provisions of the Civil Code which obligate a party to return money received through mistake.⁵⁷

D. INSURANCE

FIRE INSURANCE. The Anti-Technicality Statute⁵⁸ provides that no policy of fire insurance shall be avoided for breach of any representation, warranty or condition unless such breach increase either the moral or physical hazard. In *Brough v. Presidential Fire & Marine Ins. Co.*⁵⁹ the insurance in controversy covered a building which the insured had built on ground being purchased under a bond for deed. The insurer contended that the policy had been avoided by breach of the condition requiring the building to be on land owned by the insured in fee simple. The court held that the insurer had failed to prove any increased hazard by the breach of the condition, and properly rendered judgment for the insured.

LIFE INSURANCE. Two cases involved the proceeds of life insurance policies payable to the estate of the insured. In *State v.*

57. Arts. 2301, 2302, La. Civil Code of 1870.

58. La. Act 222 of 1928, § 1 [Dart's Stats. (1932) § 4191].

59. 189 La. 880, 181 So. 432 (1938), noted in (1938) 13 Tulane L. Rev. 148.

*Succession of Brewer*⁶⁰ the court again held that such proceeds were subject to the inheritance tax. *Michiels v. Succession of Gladden*⁶¹ was a case involving the statute⁶² which exempted life insurance proceeds from the payment of debts. The court here recognized that an insured's right to dispose by will of the proceeds of life insurance payable to his estate carried with it the right to direct his executors to apply such proceeds to the payment of his debts.

In *Giuffria v. Metropolitan Life Ins. Co.*⁶³ the insured sought to change the beneficiary of a policy while on his death bed. The proper form was executed, delivered to the insurer and actually received at its home office one day prior to the insured's death. The policy provision relating to change of beneficiary required the surrender of the original policy. This was not complied with until a day before the insured's death purely because of the original beneficiary's failure to deliver it timely to the insured.⁶⁴ In a suit by the substituted beneficiary against the insurer, the latter deposited the proceeds of the policy in court and impleaded both beneficiaries. The court held the attempted change of beneficiary ineffective and decreed the proceeds to belong to the original beneficiary. Every other American jurisdiction which has had occasion to consider these questions has always held contrary to this case.⁶⁵

A statute⁶⁶ provides that the policy and documents attached thereto constitute the entire contract of insurance; and that no statement shall be used by the insurer as a defense unless it be in writing and indorsed upon or attached to the policy when is-

60. 190 La. 810, 182 So. 820 (1938).

61. 190 La. 917, 183 So. 217 (1938), noted in (1938) 1 LOUISIANA LAW REVIEW 239.

62. La. Act 189 of 1914, § 1, as amended by La. Acts 95 of 1934, § 1, and 155 of 1934, § 2 [Dart's Stats. (Supp. 1938) § 4105].

63. 188 La. 837, 178 So. 368 (1937).

64. The policy was held by the local office of the insurer as security for a policy loan. Realizing that the insured might desire to change beneficiaries, the original beneficiary paid this loan to secure possession of the policy. When the insured requested the policy, she unduly delayed compliance, so that the policy was delivered to the insured only two days before his death. The day before his death it was surrendered to the local agent of the company, but because of his death was never forwarded to the home office.

65. See the host of cases cited in Vance on Insurance (2 ed. 1930) 573-574; 2 Couch on Insurance (1929) 912-915, § 324; 7 Cooley's Briefs on Insurance (2 ed. 1928) 6448 et seq. In a few of the states where the distinction between law and equity still exists, the attempted change of beneficiary might be deemed ineffective in an action at law. But in all jurisdictions except Louisiana, where the question was presented in an equity interpleader proceeding, the substituted beneficiary would be allowed to recover.

66. La. Act 52 of 1906 as amended by La. Act 227 of 1916, § 2 [Dart's Stats. (1932) § 4113].

sued. In *Laurent v. Unity Industrial Life Ins. Co.*⁶⁷ the insured was an agent who had become indebted to the defendant insurer for premiums collected and not remitted. In part payment of this debt, it was alleged that the insured orally agreed to cancel the policy and apply the accumulated reserve to this indebtedness. It was admitted that this accumulated reserve (but for its application by the insured to his indebtedness) would have been sufficient to carry the policy until the insured's death. Evidence in support of this defense of cancellation was excluded by the court under authority of the act referred to above. The dissenting opinion of Mr. Chief Justice O'Niell pointed out the inapplicability of the statute to the facts of the case.⁶⁸ The effects of this unfortunate decision will be far-reaching.⁶⁹

*Brunson v. Mutual Life Ins. Co. of New York*⁷⁰ presented the question of the right of a beneficiary to recover double indemnity under a policy affording such coverage for death resulting from bodily injury effected solely through external, violent and accidental means. The trial court had held that an allegation that the insured came to his death "through unexpected and accidental complications from the extractions" of several teeth did not state a cause of action for double indemnity benefits. The Supreme Court, finding this allegation sufficient, reversed the judgment appealed from and remanded the case for trial. In *Madison v. Prudential Ins. Co. of America*⁷¹ the insurer appealed from a judgment condemning it to pay an attorney permanent and total disability benefits, and further imposing penalties upon it for its refusal to comply amicably with its policy obligations. Two contentions were advanced by the defendant to defeat recovery: (1) the disability was not permanent since it appeared that the in-

67. 189 La. 426, 179 So. 586 (1938), noted in (1938) 13 Tulane L. Rev. 150.

68. The object of this statute was to suppress the practice of making documents not annexed to the policy, and of which the insured usually knew absolutely nothing, a part of the contract by reference. It was never intended to prevent subsequent modification of the contract by mutual agreement of insured and insurer.

69. For instance, it is certain to question the efficacy of one of the devices which insurance companies have employed in good faith to aid their distressed policyholders. When an insured is financially unable to meet the premium payments on a policy, the insurer commonly permits him to reduce the coverage and use the reserve thereby rendered available to carry the reduced coverage for some little time. While the agreement to reduce the coverage is always in writing, and usually annexed to the original policy, it cannot be "attached to the policy when issued." It is always possible, of course, for the courts to protect the insurer in such cases through the application of some doctrine of laches or equitable estoppel.

70. 189 La. 743, 180 So. 506 (1938).

71. 190 La. 103, 181 So. 871 (1937).

sured might recover eventually; and (2) the disability was not total since the attorney could perform some slight professional duties. Under well settled principles of insurance law both contentions were rejected. The judgment appealed from was amended, however, by striking all penalties therefrom. The insurer was held to have defended the action in good faith.

Prior to 1934, if an industrial insurer issued a policy without requiring a medical examination of the insured, it was barred from invoking a forfeiture on any ground which might have been discovered by the due diligence of its agents.⁷² A statute of 1934⁷³ qualified this rule by permitting an industrial insurer to assert a forfeiture for fraudulent answers to questions propounded by a written application. In *Geddes & Moss U. & E. Co. v. First National Life Ins. Co.*⁷⁴ the policy in controversy had been issued prior to 1934, but the insured died in 1936. The question presented was whether the 1934 statute applied retrospectively so as to permit the insurer to avoid the policy for the insured's fraud in falsely stating in the written application that she was in sound health at the time. On dual grounds, the court found it unnecessary to determine whether the statute was remedial legislation. It was held that, conceding *arguendo* the statute to be a remedial one, it disclosed a legislative intent to be applied only prospectively. Further, the court found that a retrospective application of the 1934 act would impair the obligation of the insured's contract.

MISCELLANEOUS. *Parks v. Hall*⁷⁵ presented for interpretation the "omnibus clause" of a casualty insurance policy which covered the operation of an automobile by any person with the "permission of assured." The insured had directed his chauffeur to take the car to be washed and greased, to thereafter inquire about some packages at the express office and then return the car to the insured's residence. The wash rack at the garage being in use, the chauffeur picked up a friend of his and two women and drove

72. La. Act 97 of 1908, § 1, as amended by La. Act 195 of 1932, § 1 [Dart's Stats. (1932) § 4118].

73. La. Act 160 of 1934 [Dart's Stats. (Supp. 1938) §§ 4134.1-4134.3]. The question presented would be foreclosed, in any case involving a policy issued subsequent to the effective date of the 1938 statutes, by La. Act 144 of 1936, § 1, as amended by La. Act 140 of 1938, § 1 [Dart's Stats. (Supp. 1938) § 4134.4]. This act, as amended, provides that industrial life insurance policies are incontestable after one year, except for nonpayment of premiums.

74. 189 La. 891, 181 So. 436 (1938), affirming *Geddes & Moss U. & E. Co. v. First National Life Ins. Co.*, 177 So. 818 (La. App. 1938), noted in (1938) 12 Tulane L. Rev. 469.

75. *Parks v. Hall* (two cases), *Hall v. Hall*, *Carbons Consolidated v. Same*,

some distance out of town with them to collect some money due the friend. On the return trip to the garage the accident in controversy occurred. The evidence showed that the insured, although knowing of the previous personal use of the auto by the chauffeur, had never objected thereto. The court found that the chauffeur was using the car with the "permission of assured" within the intendment of the omnibus clause, and held the casualty insurer liable.

*Turner v. Metropolitan Life Ins. Co.*⁷⁶ presented several factual issues as to whether an employee insured under a group life policy was totally and permanently disabled. All such issues were resolved by the court in favor of the insured. One question of law was presented. The policy required the insured to furnish "due proof" of his disability to the insurer, but failed to impose any time limit therefor. In view of the late discovery by the insured of his true condition, the submission of proof thereof two years after the accident was held sufficient.

189 La. 849, 181 So. 191 (1938). These decisions reversed *Parks v. Hall*, 179 So. 868 (La. App. 1937); *Id.*, 179 So. 877 (La. App. 1937); *Hall v. Hall*, 179 So. 877 (La. App. 1937); *Carbons Consolidated v. Hall*, 179 So. 878 (La. App. 1937). See Note (1938) 13 Tulane L. Rev. 146.

76. 189 La. 342, 179 So. 448 (1938).

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EDITORIAL

INSTITUTE ON FEDERAL RULES OF CIVIL PROCEDURE

A current issue of the American Bar Association Journal states that no activity of the organized bar in recent years has been so well received by practicing lawyers as the legal institutes on the new Federal Rules of Civil Procedure that are being held in many parts of the country. Ample evidence of the correctness of this assertion was afforded in the marked success of the Institute held in New Orleans, December 16th and 17th, under the sponsorship of the New Orleans Bar Association in cooperation with Louisiana's three law schools. For the success of the New Orleans Institute, congratulations are particularly due to the members of the active and energetic Committee on Arrangements headed by Mr. Charles F. Fletchinger of the New Orleans Bar. Registration for the Institute totaled 660—including lawyers,

judges, law students and law teachers. Representatives were present from the states of Arkansas, Mississippi, Texas and Alabama. The lecturers included three members of the Supreme Court's Advisory Committee which drafted the rules: Dean Charles E. Clark of the Yale Law School; Major Edgar Bronson Tolman, Editor of the American Bar Association Journal; and Hon. Monte M. Lemann of the New Orleans Bar. The fourth speaker was Hon. Joseph C. Hutcheson, Jr., Judge of the United States Circuit Court of Appeals for the Fifth Circuit. All sessions were well attended and the high caliber of the program was marked by the sustained enthusiastic interest of those present.

As a result of the New Orleans Institute, one could not fail to realize that the new Federal Rules will inevitably cause a movement for procedural reform throughout the United States tending toward the establishment of a single procedural system. This movement will probably be as far-reaching in its effect as that of the David Dudley Field code pleading reform movement of 1848. With the processes of conformity now reversed, intensive re-examination of procedure in various states seems certain to follow and this will, it is expected, lead to widespread adoption of the new procedural advances. In Ohio, for example, the Judicial Council has already recommended a series of amendments to the state procedure designed to make it conform to the new Federal Rules.

During the New Orleans Institute the statement was repeatedly made that, due to the advanced views of Edward Livingston reflected in the Louisiana Code of Practice, there is probably less difference between the new Federal procedure and Louisiana practice than exists between the new rules and the practice of any other state. In general, the Louisiana and Federal systems have many similar features, and much of the new Federal practice which will be regarded as strange innovation by the practitioners of other states will be familiar to the Louisiana lawyer. However, the legal profession in Louisiana should give serious consideration to that variety of matters in which the Louisiana procedure might be considerably strengthened and improved by a borrowing from the advanced views of the new Federal Rules. Due largely to inertia, procedural reform has been practically at a standstill in Louisiana since the redaction of the Code of Practice of 1825. The new widespread interest in the subject of procedure resulting from the New Orleans Institute should add an impetus to a movement for procedural reform in Louisiana.

The success of the New Orleans Institute additionally demonstrates the vast possibilities latent in the program of post-admission legal education, but also raises the problem of the future of that movement in Louisiana. It has been shown that with a subject of timely interest and of practical value to the bar and with a panel of able speakers carefully selected, the legal profession in Louisiana will support and insure the success of programs of post-admission legal education. A variety of topics that might profitably be treated suggest themselves—Administrative Law, Labor Law (including the Wagner Act, and the Wages and Hour Law), the Chandler Bankruptcy Act, Social Security Legislation and Taxation. The bar of Louisiana is to be congratulated on the excellent start that has been made. It is to be hoped that the movement will be continued and that similar programs will be arranged in the not too distant future.

PAUL M. HEBERT, *Dean*

Comments

ROYALTY—VINCENT v. BULLOCK

Louisiana Supreme Court, 1939

On January 10, 1939, the Supreme Court in the case of *Vincent v. Bullock*¹ handed down a landmark decision of an importance as far-reaching as that in *Frost-Johnson Lumber Co. v. Saling's Heirs*.² The latter case had definitely declared Louisiana's position to be in accord with the non-ownership theory of minerals in place with the corollary that the right to explore was a servitude prescribable by non-user in ten years. Since that memorable decision, constant efforts have been made to find a method of conveyancing which would, without production, tie up lands favorable for present or future exploration and outwit the wise policy of the state against such practice. *Vincent v. Bullock*, in preserving the rights of free conveyancing set forth by our law and at the same time continuing the prudent land policy of the state without departing from the articles of the Code, is a scholarly treatise and masterful example of juridical art.

The case arose as an action in jactitation, to cancel from the record an instrument wherein a certain mineral interest had been sold and assigned by two of the defendants to a third defendant on March 1, 1937. Plaintiffs alleged that this interest belonged to them and their assignees by virtue of a reservation made by them in a land sale on February 22, 1927. The stipulation upon which the plaintiffs based their present ownership appeared in the following language:

"It is however, understood and agreed that the vendors herein reserve unto themselves and their heirs and assigns, in perpetuity, a one-sixteenth (1/16th) royalty of all the oil, gas and other minerals produced and saved from said premises; said royalty to be delivered to the vendors or assigns, free of cost of production and a royalty of twenty-five cents per ton for all salt and sulphur mined and marketed off said premises. This royalty reservation forms part of the purchase price."³

Defendants pleaded the prescription of ten years *liberandi causa*.

1. *Vincent v. Bullock*, (La. Sup. Ct., Docket No. 35,088, Jan. 10, 1939).

2. 150 La. 756, 91 So. 207 (1922).

3. *Vincent v. Bullock*, quoted in opinion of Fournet, J., p. 2 (La. Sup. Ct., Docket No. 35,088, Jan. 10, 1939).

The plaintiffs contended that the reservation made by them was not a servitude subject to the prescription of non-user but was a rent charge or a servitude contingent upon the event of production or a real right dependent upon a future happening. In the final alternative interruption of prescription was pleaded. The court held:

(1) That the reservation was not a servitude but "a real obligation which passed with the property into the hands of the present owner;"⁴

(2) That the real right imposed upon the land was subject to prescription of ten years under Articles 3528, 3529, 3544, 3549, 3556 of the Civil Code. Further, that the obligation (to pay royalty) was suspensive on condition that the event—production—was to happen within the ten year limit *set by law* for development of a servitude and hence was considered as broken when that time expired under Articles 2013, 2021, 2038 of the Civil Code;

(3) That since the reservation was *not* a servitude, obviously the articles controlling servitude, particularly those dealing with obstacle, et cetera, did not apply;

(4) That the prescription was *not* interrupted or extended by the acts, stipulations and acknowledgments of the defendants.

The loose use of the word "royalty" in Louisiana has resulted in at least four popular concepts of its meaning. It is used erroneously as synonymous with servitude, to mean conveying or reserving the full right to explore for oil and gas. It is correctly used as the equivalent of the word rent⁵ to indicate the proportion of oil and gas extracted which belongs to the lessor under a specific lease contract, and this category is further subdivided. It is used to represent an interest sold or reserved by the owner of the land to bear upon any lease that exists or may in the future exist,

4. *Id.* at 11.

5. *Martel v. Jennings-Heywood Oil Syndicate*, 114 La. 351, 38 So. 253 (1905); *Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate*, 115 La. 107, 38 So. 932 (1905); *Goodson v. Vivian Oil Co.*, 129 La. 955, 57 So. 281 (1912); *Hudspeth v. Producers' Oil Co.*, 134 La. 1013, 64 So. 891 (1914); *Baird v. Atlas Oil Co.*, 146 La. 1091, 84 So. 366 (1920); *Rowe v. Atlas Oil Co.*, 147 La. 37, 84 So. 485 (1920); *Pipes v. Payne*, 156 La. 791, 101 So. 144 (1924); *Logan v. State Gravel Co.*, 158 La. 105, 103 So. 526 (1925); *Board of Commissioners of Caddo Levee District v. Pure Oil Co.*, 167 La. 801, 120 So. 373 (1928); *State v. Standard Oil Co.*, 164 La. 334, 113 So. 867 (1927); *Board of Commissioners of Caddo Levee District v. Pure Oil Co.*, 167 La. 821, 120 So. 380 (1929); *Board of Commissioners of Caddo Levee District v. Pure Oil Co.*, 173 La. 313, 137 So. 46 (1931); *Roberson v. Pioneer Gas Co.*, 173 La. 313, 137 So. 46 (1931); *Shell Petroleum Corp. v. Calcasieu Real Estate and Oil Co.*, 185 La. 751, 170 So. 785 (1936).

but accompanied by a reservation to the landowner or his vendee of the right to entirely control the leasing of the property.⁶ It is used to indicate the consideration paid for a servitude or lease.⁷ The inexact use of the word and the fact of its various connotations have caused confusion in the minds of both the profession and the laity and have also offered a fruitful ground for fraud.⁸ That Louisiana is not alone in confusion of the concept and lack of exactitude in the use of the word "royalty" clearly appears from commentators upon the practices of other jurisdictions.⁹

*Logan v. State Gravel Co.*¹⁰ may be said to have definitely fixed the meaning of the word "royalty" in Louisiana when used in a present or in connection with a contemplated lease. A proportionate share of the working interest was held good consideration for the lessor and the lease to be binding. That the "portion is called 'royalty' instead of rent is not of the least consequence."¹¹ This decision has been firmly adhered to and lawyers, producers and conveyancers are clear in the meaning and legal results of the use of the term in or regarding a lease.

The instant case in holding that in the absence of a lease, the term indicates disposition of a real right imposed on the land and running with it, is eminently correct and well supported by the articles of the Code and also by the case of *Callahan v. Martin*¹² from California, a "qualified ownership" state.¹³ The present decision is also in line with the custom and understanding of land owners in a large area of the state. The logic is unanswerable that royalty proceeds out of the right to lease or to explore. It cannot be synonymous with the servitude or lease which is the basis of its existence and upon which it depends for life. If it depends upon a lease, it perishes with that contract. If it depends upon a servitude, it dies with that grant to use. If it depends upon full ownership of land, it depends upon title. Again, the court's classification of the contract as being conditional, depen-

6. *Mt. Forest Fur Farms of America v. Cockrell*, 179 La. 795, 155 So. 328 (1934); *Wall v. United Gas Public Service Co.*, 181 So. 562 (La. App. 1938).

7. *Wilkins v. Nelson*, 155 La. 897, 99 So. 607 (1924); *Waller v. Commissioner of Internal Revenue*, 40 F. (2d) 892 (C.C.A. 5th, 1930); *Herold v. Commissioner of Internal Revenue*, 42 F. (2d) 942 (C.C.A. 5th, 1930); *Lucas v. Baucum*, 50 F. (2d) 806 (C.C.A. 5th, 1931).

8. *Chatman v. Giddens*, 150 La. 594, 91 So. 56 (1922); *Fontenot v. Ludeau* (Docket Nos. 34, 872-3-4-5-6-7, now before La. Sup. Ct.).

9. See particularly *Glassmire, Oil and Gas Leases and Royalties* (1935) 118.

10. 158 La. 105, 103 So. 526 (1925).

11. 158 La. at 109, 103 So. at 527.

12. 3 Cal. (2d) 110, 43 P. (2d) 788 (1935).

13. *Glassmire*, op. cit. supra note 9, at 100.

dent upon the suspensive element of production, logically follows. That the rules of conditional obligation should apply is obvious.

The matter of term or life of the condition is the one of crucial interest. Article 2038 cited by the court appears in the following language:

"When an obligation has been contracted on condition that an event shall happen within a limited time, the condition is considered as broken, when the time has expired without the event having taken place. If there is no time fixed, the condition may always be performed, and it is not considered as broken, until it is become certain that the event will not happen."

The court stated that while "the contract did not designate a time within which the event must happen, nevertheless that time is limited by law and 'the condition is considered as broken, when the time (10 years) has expired without the event having taken place.' (Brackets ours.)"¹⁴ This deduction seems to be postulated on the theory that since a landowner selling land and reserving mineral rights clearly retains but a servitude prescriptible in ten years, that when he sells land and reserves royalty, he is bound to know that this element which is dependent upon the servitude (susceptible of reservation for *only ten years*) must perish with that right. It might be argued that the royalty, being part of the consideration of the land purchase in this deed, was in effect a repurchase of royalty from the vendee, landowner. This would have raised the question of the validity of the perpetuity provision and it is a matter of deep gratification to those who are opposed to such a result that the court closed that door on the question raised by *reservation*.

The problem of term in connection with a *sale* of royalty might be said to remain open. Since royalty proceeds out of the right to explore, whether grounded upon lease or servitude, and is limited in term by the life of those rights, it may be argued that the landowner having inherent in his full ownership a perpetual right of exploration, might grant royalty with unlimited term. When that question is presented, however, the court might well indicate that since the landowner can grant but a ten year servitude under the law, he is also limited to that term in granting a real right having its root in a servitude regardless of wheth-

14. *Vincent v. Bullock*, Opinion of Fournet, J., p. 14 (La. Sup. Ct., Docket No. 35,088, Jan. 10, 1939).

er the latter right is unlimited to the landowner himself or not. It is the hope of the writer that the court in its wisdom will see fit to adhere to the latter line of reasoning as they did in the decision under discussion. Under the first argument lies the fear that the excellent land policy of the state may be defeated and small holders particularly may be unprotected and led by economic stress to dispose forever of their most valuable possession for relatively small sums. In the reservation question instanced by the case under discussion, the logical application by the court of the rules of suspensive conditional obligation avoided this disaster without departure from the clear rules of civil contract and achieved a perfect legal as well as social result.

The court held with the trial judge that the reservation was *not* a rent charge as there was no "certain sum of money to be paid annually"¹⁵ in perpetuity¹⁶ nor could the "reservation be classified as calling for the delivery of 'fruits' "¹⁷ because oil is not a fruit.¹⁸ Furthermore, the contract was not redeemable,¹⁹ and since the value of minerals in the ground is but "contemplative, speculative and conjectural, not to say fanciful and theoretical"²⁰ there would be no "method of arriving at the value for redemption purposes"²¹ in such a contract. In this conclusion the court was obviously correct and again the reprobated perpetuity idea was avoided.

The plea that the prescription had been interrupted was grounded upon statements by the vendee to his transferee that the reservation was contained in the original act of sale, upon a stipulation in a subsequent donation that the gift was made "subject to the reservation,"²² and upon a clause in a lease the purpose of which was to insure to the lessee his full 7/8 share. This plea

15. *Vincent v. Bullock*, Judgment of Simon, J., p. 7 (La. Dist. Ct., 16th Judicial Dist., Docket No. 10,806, Sept. 15, 1938); See Art. 2779, La. Civil Code of 1870.

16. Art. 2780, La. Civil Code of 1870.

17. *Vincent v. Bullock*, Judgment of Simon, J., p. 7 (La. Dist. Ct., 16th Judicial Dist., Docket No. 10,806, Sept. 15, 1938).

18. *Elder v. Ellerbe*, 135 La. 990, 66 So. 337 (1914).

19. Arts. 2788, 2789, 2790, La. Civil Code of 1870.

20. *Vincent v. Bullock*, Judgment of Simon, J., p. 7 (La. Dist. Ct., 16th Judicial Dist., Docket No. 10,806, Sept. 15, 1938) quoting from *Wilkins v. Nelson*, 155 La. 807, 813, 99 So. 607, 609 (1924).

21. *Vincent v. Bullock*, Judgment of Simon, J., p. 7 (La. Dist. Ct., 16th Judicial Dist., Docket No. 10,806, Sept. 15, 1938); Arts. 2788, 2789, 2790, La. Civil Code of 1870.

22. *Vincent v. Bullock*, Opinion of Fournet, J., p. 16 (La. Sup. Ct., Docket No. 35,088, Jan. 10, 1939).

was disposed of under the well accepted test²³ that a "mere acknowledgment" is not enough but must be coupled with "the purpose and intention of the party making the acknowledgment to interrupt the prescription then running."²⁴

The case of *Mulhern v. Hayne*²⁵ was relied upon in urging an extension²⁶ of the ten year period. In disposing of this point, the court made the following statement:

"... it is conceded that, in order to give a valid lease, it was not necessary for the plaintiffs (royalty owners) to join in the execution thereof, and, consequently, the decision in the *Mulhern* case is not applicable."²⁷

In holding that a right to explore is not granted by a royalty reservation and indicating that consent of mere royalty owners is not necessary to lease, great difficulty in arranging for production may be obviated. Instances are on record in Louisiana where royalty fractions of 119,317/5,000,000 and 3,340,909/11,000,000 were sold. This might well have made leasing a practical impossibility, had the consent of each fractional owner been held necessary.

Thus, in every aspect of the case, the court not only adhered in logic to the legal concepts involved in the problem, but materially expedited free conveyancing in a thoroughly practical manner and preserved the valuable land policy of the state.

HARRIET S. DAGGETT*

23. *Lewis v. Bodcaw Lumber Co.*, 167 La. 1067, 120 So. 859 (1929); *La. Del Oil Properties v. Magnolia Petroleum Co.*, 169 La. 1137, 126 So. 684 (1930); *Arent v. Hunter*, 171 La. 1059, 133 So. 157 (1931); *Ventress v. Akin*, 177 So. 117 (La. App. 1937); *Goldsmith v. McCoy*, 190 La. 320, 182 So. 519 (1938); *McEa- chern v. Kinnebrew*, 184 So. 601 (La. App. 1938).

24. *Vincent v. Bullock*, Opinion of Fournet, J., p. 15 (La. Sup. Ct., Docket No. 35,088, Jan. 10, 1939) quoting from *Bremer v. North Central Texas Oil Co., Inc.*, 185 La. 917, 922, 171 So. 75, 77 (1936). [This was quoted with approval in *Goldsmith v. McCoy*, 190 La. 320, 182 So. 519 (1938).]

25. 171 La. 1003, 132 So. 659 (1931).

26. It may be pointed out in passing that the court seemed to emphasize the idea of *extension* rather than *interruption* when a joint lease is conferred, the term of which extends beyond the original ten year period. See *Coyle v. North Central Texas Oil Co.*, 187 La. 238, 174 So. 274 (1937).

27. *Vincent v. Bullock*, Opinion of Fournet, J., p. 18 (La. Sup. Ct., Docket No. 35,088, Jan. 10, 1939).

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RECONCILIATION AND THE RE-ESTABLISHMENT
OF THE COMMUNITY

The reassertion¹ of the rule that a reconciliation, after a judgment of separation from bed and board, does not re-establish the community of property between spouses again presents the question of its soundness. To the average layman, the rule in the very nature of things would not seem to exist. To the lawyer, some doubts as to its legal and logical foundations may well appear.

A judgment of separation from bed and board does not dissolve the marriage,² but it dissolves the community of property.³ The policy of the law, in providing in certain instances for separation⁴ rather than for immediate divorce,⁵ is to encourage the resumption of the marriage relation by giving the spouses an opportunity to become reconciled.⁶ This policy is presumed to be effectuated by the statutory provisions which declare *inter alia* that a certain period of time must elapse after a judgment of separation before the matrimonial bond may be completely dissolved;⁷ and that a reconciliation of the spouses, whether after the institution of the action⁸ or after a judgment,⁹ shall operate to extinguish the action or the judgment respectively.¹⁰ It is further provided that an action for separation based on causes arising prior to the reconciliation shall also be extinguished by the happening of that event.¹¹ A new suit must therefore be grounded on

1. *Reichert v. Lloveras*, 188 La. 447, 451, 177 So. 569, 570 (1937). Concerning similar aspects of this problem in other jurisdictions, see Comment (1932) 20 Calif. L. Rev. 294; Note (1932) 76 A.L.R. 284. Cf. *Butler v. Bolinger*, 16 La. App. 397, 133 So. 778 (1931).

2. Art. 136, La. Civil Code of 1870; *McNeely v. McNeely*, 47 La. Ann. 1321, 17 So. 928 (1895); *Stallings v. Stallings*, 177 La. 488, 148 So. 687 (1933).

3. Arts. 123, 136, 155, La. Civil Code of 1870; *Williams v. Goss*, 43 La. Ann. 868, 9 So. 750 (1891); *Conrad v. Conrad*, 170 La. 312, 127 So. 725 (1930); *Butler v. Bolinger*, 16 La. App. 397, 133 So. 778 (1931). Cf. *Brown v. Tauzin*, 185 La. 86, 168 So. 502 (1936).

4. Art. 138, La. Civil Code of 1870.

5. Art. 139, La. Civil Code of 1870. Cf. La. Acts 25 of 1898, § 1, and 56 of 1932, § 1 [Dart's Stats. (1932) § 2209].

6. *Perkins v. Potts*, 8 La. Ann. 14 (1853); *Mack v. Handy*, 39 La. Ann. 491, 2 So. 181 (1887); *Martin v. Martin*, 151 La. 530, 92 So. 46 (1922); *Butler v. Bolinger*, 16 La. App. 397, 133 So. 778 (1931). Cf. Art. 89, La. Civil Code of 1870.

7. Art. 139, La. Civil Code of 1870. Cf. La. Acts 25 of 1898, § 1, and 56 of 1932, § 1 [Dart's Stats. (1932) § 2209].

8. Art. 152, La. Civil Code of 1870. *Spring v. Mendoza*, 171 La. 461, 131 So. 299 (1930). Cf. Art. 154, La. Civil Code of 1870.

9. *Succession of Liddell*, 22 La. Ann. 9 (1870). See *Von Hoven v. Weller*, 38 La. Ann. 903, 904 (1886); *Linzay v. Linzay*, 51 La. Ann. 630, 635, 25 So. 308, 310 (1899). Cf. Art. 152, La. Civil Code of 1870.

10. *Contra*: New York, see Note (1930) 8 N.Y.U.L.Q. Rev. 326; Note (1933) 85 A.L.R. 420, 423.

11. Art. 152, La. Civil Code of 1870; *Bienvenu v. Her Husband*, 14 La. Ann.

causes arising subsequent to the reconciliation, but the privilege is reserved to make use of the former causes to corroborate the new allegation.¹² To further effectuate this policy of preserving the marriage, a reconciliation also has other effects. A judicial grant of alimony *pendente lite* is extinguished.¹³ In some jurisdictions, with certain limitations,¹⁴ it operates to annul a property settlement of the spouses.¹⁵ Thus, after a reconciliation the only remaining effect of the Louisiana judgment of separation from bed and board is the dissolution of the community.¹⁶

The Civil Code does not define what acts of the parties constitute a sufficient reconciliation to bar an action for separation or to annul a judgment to that effect. Although theoretically a reconciliation is subjective,¹⁷ it has been held that a conclusive presumption attaches wherever the court finds the following factors present: (1) a mutual forgiveness—with complete knowledge of the marital offense on the part of the injured spouse, and an express or implied acceptance by the offender, and (2) a voluntary resumption of the marriage relation and marital cohabitation.¹⁸ Forgiveness has been distinguished from forbearance,¹⁹ and a reconciliation has been held to have the same effect in Louisiana that condonation or forgiveness has in common law

386 (1859); *Schaub v. Schaub*, 117 La. 727, 42 So. 249 (1906). Cf. *J.F.C. v. M.E., His Wife*, 6 Rob. 135 (La. 1843).

12. Art. 153, La. Civil Code of 1870; *Cass v. Cass*, 34 La. Ann. 611 (1882); *Shoeffner v. Shoeffner*, 158 La. 933, 105 So. 18 (1925); *Reichert v. Lloveras*, 188 La. 447, 451, 177 So. 569, 570 (1937). Cf. Art. 154 La. Civil Code of 1870 (same exceptions apply to divorce action).

13. See Arts. 119, 148, 152, La. Civil Code of 1870; *Player v. Player*, 162 La. 229, 232, 110 So. 332, 333 (1926). This seems to be an exception to the general rule: Note (1926) 40 A.L.R. 1227, 1239; Note (1933) 85 A.L.R. 420, 423; Note (1930) 8 N.Y.U.L.Q. Rev. 326.

14. Note (1926) 40 A.L.R. 1227; Note (1932) 27 Ill. L. Rev. 315; Note (1933) 85 A.L.R. 420.

15. *Dillon v. Dillon*, 103 Neb. 322, 171 N.W. 917 (1919); *Rose v. Rogers*, 264 S.W. 954 (Tex. Civ. App. 1924); *Ward v. Ward*, 81 Mont. 587, 264 Pac. 667 (1928). Cf. *Nichols v. Her Husband*, 7 La. Ann. 262 (1852); Art. 2446 (1), La. Civil Code of 1870; Note (1926) 40 A.L.R. 1227; Note (1932) 27 Ill. L. Rev. 315; Note (1933) 85 A.L.R. 420.

16. *Crochet v. Dugas*, 126 La. 285, 52 So. 495 (1910). See Arts. 123, 136, 155, La. Civil Code of 1870; *Williams v. Goss*, 43 La. Ann. 868, 9 So. 750 (1891); *Conrad v. Conrad*, 170 La. 312, 127 So. 725 (1930); *Butler v. Bolinger*, 16 La. App. 397, 133 So. 778 (1931).

17. Maille, *Divorce Laws of the State of Louisiana* (1884) 85.

18. *Martin v. Martin*, 151 La. 530, 92 So. 46 (1922); *Vicknair v. Terracina*, 164 La. 117, 113 So. 787 (1927); *Spence v. Spence*, 162 La. 4, 110 So. 68 ((1926). Cf. Maille, *op. cit. supra* note 17, at 85; *Turnbull v. Turnbull*, 23 Ark. 615 (1861); *Odum v. Odum*, 36 Ga. 286 (1867).

19. *Martin v. Martin*, 151 La. 530, 92 So. 46 (1922); *Terrell v. Boarman*, 34 La. Ann. 301 (1882); *Balfe v. Balfe*, 165 La. 283, 115 So. 489 (1928); *New v. New*, 186 La. 1017, 173 So. 748 (1937).

jurisdictions.²⁰ It may be doubtful whether a single act of marital cohabitation should be deemed sufficient to constitute a reconciliation,²¹ but when other factors are present, the social implications together with the recognized public policy of preserving the marriage unite to furnish a sufficient "reconciliation"²² for the courts to seal the marriage against dissolution.

Although the rule reasserted in the recent case of *Reichert v. Lloveras*²³ appears to be settled,²⁴ namely, that after the occurrence of a reconciliation the sole remaining effect of the judgment of separation is the dissolution of the community, an analysis of the *rationale* employed by the courts in formulating this principle fails to disclose any serious obstacle which would have prevented a different conclusion. Since the judgment from which the dissolution of the community flowed has become annulled in this manner, should not that dissolution also be vitiated? Otherwise, to retain the dissolution of the community under such circumstances appears to be permitting a separation of property in a manner not recognized by the Civil Code²⁵ or by the jurisprudence involving the action for separation of property *per se*.²⁶ There is no adequate reason either in law or logic why the Supreme Court of Louisiana today might not formulate the contrary rule, especially since it need not be bound by the common law doctrine of *stare decisis*.²⁷ The present principle was not founded upon any specific article of the Code or upon any specific statute—nor can it be so based today—but was evolved from an application of the familiar principle of statutory construction embodied in the maxim *inclusio unius est exclusio alterius*. By this process of reasoning the Supreme Court took the position that, since the redactors of the Civil Code did not include provision for the re-

20. *Hill v. Hill*, 112 La. 770, 36 So. 678 (1904).

21. Cf. 19 *Corpus Juris* 83-87.

22. *Martin v. Martin*, 151 La. 530, 92 So. 46 (1922); *Spence v. Spence*, 162 La. 4, 110 So. 68 (1926). Cf. *Jacobs v. Tobelman*, 36 La. Ann. 842 (1884); *Lewis v. Hurry*, 119 La. 1035, 44 So. 856 (1907).

23. 188 La. 447, 451, 177 So. 569, 570 (1937).

24. *Ford v. Kittredge*, 26 La. Ann. 190 (1874); *Crochet v. Dugas*, 126 La. 285, 52 So. 495 (1910); *Succession of Le Besque*, 137 La. 567, 68 So. 956 (1915).

25. Arts. 2425 et seq., La. Civil Code of 1870 (wife's action for separation of property), 2332, 2392, 2399 (stipulation against a community in a marriage contract), 1991, 2433, 2434 (creditor's rights relative to a separation of property).

26. *Davock v. Darcy*, 6 Rob. 342 (La. 1844); *Wolf & Clark v. Lowry*, 10 La. Ann. 272 (1855); *Caulk v. Picou & Husband*, 23 La. Ann. 277 (1871). See *Daggett, The Community Property System of Louisiana* (1931) 57-60.

27. *Daggett, Dainow, Hebert and McMahon, A Reappraisal Appraised: A Brief for the Civil Law of Louisiana* (1937) 12 *Tulane L. Rev.* 12, 15-24; *Miami Corporation v. State of Louisiana*, 186 La. 784, 799; 173 So. 315, 320 (1937).

establishment of the community after a reconciliation, as is done by the French Civil Code,²⁸ the judiciary was not at liberty to formulate such a rule.²⁹ No consideration was given to the fact that there is no judgment upon which to base a dissolution of the community since the judgment of separation ceased to exist by virtue of the subsequent reconciliation.³⁰ Furthermore, no consideration was given in the cases to the effect of the present rule upon the status of the community property as the economic basis of the marriage and of the family.³¹

The action for separation of property is a privilege accorded to the wife alone and then only in certain specific instances.³² This privilege has been deemed so inviolate that the law has not permitted any circumvention of it either by private agreement³³ or by a sale³⁴ between the spouses. Nothing less than a judgment

28. Art. 1451, French Civil Code: "*La communauté dissoute par la séparation soit de corps et de biens, soit de biens seulement, peut être rétablie du consentement des deux parties.*"

"*Elle ne peut l'être que par un acte passé devant notaires et avec minute, dont une expédition doit être affichée dans la forme de l'article 1445.*"

"*En ce cas, la communauté rétablie reprend son effet du jour du mariage; les choses sont remises au même état que s'il n'y avait point eu de séparation, sans préjudice néanmoins de l'exécution des actes qui, dans cet intervalle, ont pu être faits par la femme en conformité de l'article 1449.*"

"*Toute convention par laquelle les époux rétablissent leur communauté sous des conditions différentes de celles qui la réglaient antérieurement, est nulle.*"

(Translation—Cachard, French Civil Code, 1930) "A community which is dissolved by a separation, either from bed and board or of property only, can be reestablished by consent of both parties.

"This can only be done by an instrument executed in the presence of notaries, of which a record remains and of which a certified copy is published in the manner set forth in article 1445.

"In such case the community which is reestablished produces its effect from the time of the marriage; things are put back in the same state as if there had been no separation, without prejudice, nevertheless, to the fulfillment of the acts which have been performed during such interval by the wife in accordance with article 1449.

"Any agreement by which the husband and wife reestablish their community under different conditions from those which governed it previously shall be void."

29. Ford v. Kittredge, 26 La. Ann. 190, 194 (1874).

30. Succession of Liddell, 22 La. Ann. 9 (1870). Cf. Arts. 152, 153, La. Civil Code of 1870.

31. Cf. Ford v. Kittredge, 26 La. Ann. 190 (1874); Crochet v. Dugas, 126 La. 285, 52 So. 495 (1910); Succession of Le Besque, 137 La. 567, 68 So. 956 (1915).

32. Daggett, op. cit. supra note 26, at 56-58; Arts. 2425 et seq., La. Civil Code of 1870.

33. Art. 2427, La. Civil Code of 1870; Muse v. Yarborough, 11 La. 521 (1838); Maxwell v. Maxwell, 1 La. App. 413 (1925). Art. 1443 (par. 2), French Civil Code, provides: "Every voluntary separation [of property] is void."

34. Cf. Arts. 1790, 2446, La. Civil Code of 1870; Rush v. Landers, 107 La. 549, 32 So. 95, 57 L.R.A. 353 (1902); Kelly v. Kelly, 131 La. 1024, 60 So. 671 (1913); Loranger v. Citizens' Nat. Bank of Hammond, 162 La. 1054, 111 So. 418 (1927).

of separation of property together with the fulfillment of the conditions that must follow its rendition can effect a dissolution of the community.³⁵ In insisting upon a judicial decree the intention of the legislature clearly was to prevent a dismemberment of the community by mutual agreement—this being specifically prohibited by the Code.³⁶ Therefore, the effect of retaining the dissolution of the community and a “separation of goods and effects” after the judgment of separation from bed and board has become annulled by a reconciliation is to accomplish indirectly an end which is reprobated by the law. This cannot be explained away by classifying the result as an exception to the prohibition of effecting a separation of property by mutual consent, for in addition there is no judicial decree of *any kind* upon which to ground such separation.

In order that the judgment of separation of property accomplish the desired results an essential condition is that it must be timely executed.³⁷ The earlier jurisprudence on this subject was in confusion and indicated that where the judgment was accompanied by a decree for the payment of money it was only the money judgment that fell under the tardy execution, and that the judgment of separation of property stood, regardless of whether there was timely execution or not.³⁸ However, the matter has now been clarified so that there is no longer any doubt but that the judgment of separation also falls with the delayed execution in such a case.³⁹ By analogy, does it not logically follow that the dissolution of the community of property flowing from the judgment of separation from bed and board should also fall with the judgment when a reconciliation takes place between the spouses?

By the adoption of a rule which will reinstate the community

35. Arts. 2425 et seq., La. Civil Code of 1870. Cf. Daggett, *op. cit.* supra note 26, at 52, 55, 66-67. For other methods of effecting a dissolution of the community, see Arts. 123, 136, 155, 159, La. Civil Code of 1870.

36. Art. 2427, La. Civil Code of 1870.

37. Arts. 2428 et seq., La. Civil Code of 1870; *Muse v. Yarborough*, 11 La. 521, 532 (1838); *Bertie v. Walker*, 1 Rob. 431, 432 (La. 1842); *Chaffe v. Scheen and Husband*, 34 La. Ann. 684, 690 (1882). Exceptions to this rule obtain where the judgment is accompanied by a decree for the payment of money, and it is clear that an execution would have been a “vain thing” [*Holmes v. Barbin*, 13 La. Ann. 474 (1858)]; and where the judgment of separation *per se* is not susceptible of execution [*Davock v. Darcy*, 6 Rob. 342 (La. 1844); *Jones v. Widow & Heirs of Morgan*, 6 La. Ann. 630 (1851); *Holmes v. Barbin*, supra; *Vickers v. Block, Britton & Co.*, 31 La. Ann. 672 (1879); *Carite v. Trotot*, 105 U.S. 751, 26 L.Ed. 1223 (1881)].

38. *Vickers v. Block, Britton & Co.*, 31 La. Ann. 672 (1879); *Chaffe v. Forcheimer*, 35 La. Ann. 205 (1883); *Jones v. Jones*, 119 La. 677, 44 So. 429 (1907).

39. *Larose v. Naquin*, 150 La. 353, 90 So. 676 (1921); Art. 2428, La. Civil Code of 1870.

of property after a judgment of separation from bed and board has been annulled by reconciliation, it is submitted that: (1) a progressive step will be taken toward making the type of community property system obtaining in Louisiana still more equitable in its variations than the types existing in the seven other states of the Union;⁴⁰ (2) the community of property as the economic basis of the family will become more stabilized so as to fully effectuate the object of public policy to preserve the marriage; and (3) since the average layman does not realize that the original community is forever dissolved by a judgment of separation from bed and board because he reasonably believes that the reconciliation has replaced the parties in their previous status in every respect, this injustice to him will be completely eliminated.

The fact that the community is dissolved by the judgment of separation from bed and board becomes even more serious when it is realized that there is at present no recognized mode of re-establishing it. Until 1916 the well-settled prohibition against interspousal contracts⁴¹ caused the courts to conclude that once the community was dissolved, it could never be re-established between the same parties.⁴² Nevertheless, since the passage of the so-called "married women's emancipatory acts,"⁴³ the issue is raised as to whether the spouses may now contract with each other during the marriage in order to re-establish such a dissolved community. The general problem is whether the wife may now freely contract with her husband in any case,⁴⁴ and the Louisiana Supreme Court has held that where the husband and wife have entered into a joint lease of community and separate property to a third person, such a contract is valid⁴⁵—but the court was careful to point out that it was unnecessary in that case to decide whether the emancipatory acts were sufficiently comprehensive to sustain the validity of contracts between husband and wife in any other situation.⁴⁶ Nevertheless, in the light of these acts the judi-

40. Arizona, California, Idaho, New Mexico, Nevada, Texas, and Washington. See Daggett, *op. cit.* supra note 26, at 3, 200-206.

41. See Arts. 1790, 2446, La. Civil Code of 1870; *Rush v. Landers*, 107 La. 549, 32 So. 95, 57 L.R.A. 353 (1902); *Kelly v. Kelly*, 131 La. 1024, 60 So. 671 (1913); *Loranger v. Citizens' Nat. Bank of Hammond*, 162 La. 1054, 111 So. 418 (1927); Comment (1933) 8 *Tulane L. Rev.* 106, 111.

42. *Ford v. Kittredge*, 26 La. Ann. 190 (1874); *Crochet v. Dugas*, 126 La. 285, 52 So. 495 (1910); *Succession of Le Besque*, 137 La. 567, 68 So. 956 (1915).

43. La. Acts. 94 of 1916, 244 of 1918, 219 of 1920, 132 of 1926, 283 of 1928 [*Dart's Stats.* (1932) §§ 2169-2173].

44. Comment, *supra* note 41, at 115-117.

45. *Shell Petroleum Corp. v. Calcasieu Real Estate and Oil Co.*, 185 La. 751, 170 So. 785 (1936).

46. 185 La. at 773, 170 So. at 792.

ciary might find sufficient legal reason to sustain the validity of a contractual re-establishment of the community.⁴⁷ However, this method would not be sufficiently remedial for the layman who did not realize the necessity for the execution of such a contract. Furthermore, as one writer has suggested,⁴⁸ the opposing interests of contracting parties leads to law suits; therefore, to allow interspousal contracts would not be in accord with the tenor of the Code which fosters marital harmony.⁴⁹

If the judiciary does not see fit to continue the community after a reconciliation, and if it should not interpret the new emancipatory acts to allow re-establishment of the community by contract, then legislative action is necessary. The following suggestions would provide a proper legislative remedy: (1) to permit a re-establishment of the community by agreement of the spouses as is done in France⁵⁰ and Quebec,⁵¹ or as was suggested in the

47. This would seem possible despite the provision in La. Act 283 of 1928, § 5 [Dart's Stats. (1932) § 2173] which states: "Nothing herein contained shall modify or affect the laws relating to the matrimonial community of acquets and gains." If contracts between husband and wife are possible, there is logical argument for upholding a contractual re-establishment of the community without the necessity for a legislative remedy. The effect of the 1928 emancipatory act being to remove the general *incapacity* of married women to contract as set forth in Articles 1782, 1786 and 1790, such effect should not be extended to override the special interspousal contractual *prohibitions* provided in the Code such as Article 2427 (voluntary separation of community property prior to a dissolution of the marriage) and Article 2446 (interspousal contracts of sale). However, as there is no special interspousal contractual *prohibition* with respect to re-establishment of the community, it is submitted that the 1928 act may be extended to permit an interspousal contract of this nature. Cf. Comment, *supra* note 41, at 115-117. See Thompson-Ritchie Grocery Co. v. Graham, 15 La. App. 534, 536, 132 So. 394, 395 (1931), where there is dictum to the effect that contracts between husband and wife are possible. However, see Art. 1790, La. Civil Code of 1870; *Didier v. Pardue & Pardue*, 144 So. 762, 763 (La. App. 1932) (La. Act 283 of 1928 was not mentioned).

48. Comment, *supra* note 41, at 117.

49. Cf. Arts. 119, 120, 2399, 2404, La. Civil Code of 1870.

50. Art. 1451, French Civil Code. For the English text of the article, see note 28, *supra*.

51. Art. 217, Quebec Civil Code (as amended by 21 Geo. V [1931] ch. 101, § 6): "Husband and wife thus separated [by a judicial separation from bed and board], for any cause whatever, may at any time reunite and thereby put an end to the effects of the separation."

"By such reunion, the husband reassumes his rights, but the consorts remain separate as to property, unless they re-establish community of property in conformity with article 1320."

Prior to the amendment, the last paragraph of the article read: "By such reunion, the husband reassumes all his rights over the person and property of his wife, the community of property is re-established of right and, for the future, is considered as never having been dissolved."

Art. 1320, Quebec Civil Code (as amended by 21 Geo. V [1931] ch. 101, § 23): "Community dissolved by separation from bed and board, or by separation of property only, may be re-established, with the consent of the parties, in the first case when the consorts have become re-united, but, in both cases, such re-establishment can only be effected by an act before a notary as an

1910 Proposed Revision of the Louisiana Civil Code;⁵² (2) to clearly remove any disabilities attaching to interspousal contracts so far as to enable the spouses to re-establish the community;⁵³ or (3) to change the time when the marriage contract may be made,⁵⁴ in order to accomplish this result.

The most effective remedy, however, would be obtained through a judgment of our highest state court declaring that a reconciliation of the spouses subsequent to a judgment of separation from bed and board operates to replace the husband and wife in the same status in every respect—including the re-establishment of the community of property. No legal obstacle stands in the path of overruling the prior jurisprudence on this subject, especially since the courts of Louisiana need not be bound by judicial precedent. From these considerations it would appear

original, a copy of which is deposited in the office of the court which rendered the judgment of separation, and is joined to the record in the case; and mention of such deposit must be made in the register after such judgment and in the special register wherein the separation is inscribed, pursuant to article 1097 of the Code of Civil Procedure."

Art. 1321, Quebec Civil Code: "In the case of the preceding article, the community so re-established resumes its effect from the day of the marriage; things are replaced in the same condition as if there had been no separation; without prejudice, however, to such acts as the wife may have done in the interval, in conformity with article 1318.

"Every agreement by which the consorts re-establish their community upon conditions different from those by which it was previously governed, is void."

52. Art. 150, *Projet of the Commission on Revision of the Civil Code (1910)*, was inserted as a new article in the proposed new Code and read as follows: "If, after separation from bed and board, the spouses be reconciled, they may re-establish the community under the conditions as it originally existed, by an act to that effect before a notary and two witnesses, duly recorded in the conveyance records of the parish of the domicile of the parties.

"They may even restore the property, or any part thereof, or its proceeds, which belonged to the former community at the date of the judgment, by making a declaration to that effect in the act, and describing the property; otherwise the re-establishment of the community is to take effect from the date of the recording of the act.

"The remarrying of the spouses, after final divorce, will create a new community between them, unless there is a stipulation to the contrary, by the marriage contract. A community dissolved on account of the financial condition of the husband cannot be re-established."

The Commission was appointed under the authority of La. Act. 160 of 1908. For an historical account of the proposal for a revision of the Civil Code of 1870 under the auspices of the Louisiana Bar Association, see (1937) 11 *Tulane L. Rev.* 213, 228-229. The bill embodying the *projet* was rejected in the Legislature at the instance of the Bar Association, not because there was any objection to the particular new article proposed, but upon other grounds. See Special Report, Code Revision Committee (1913) 14 *La. Bar Ass'n Rep.* 345.

53. Cf. Daggett, *op. cit.* supra note 26, at 205.

54. *Ibid.*

that greater justice would be accomplished by overturning the rule reasserted in the principal case.

W. T. PEGUES

JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD*

Since its creation, the National Labor Relations Board has disposed of about a thousand cases. Of this vast number, the Supreme Court of the United States has passed on the Board's exercise of jurisdiction in seven.¹ About forty others have been reviewed by the various Circuit Courts of Appeals.

Although the decisions of the federal courts are of primary importance concerning the permissible area within which the Board may exercise its jurisdiction, nevertheless we may not overlook the attitude of the Board itself toward the scope of its powers.² The expressed intention of the Administrator of the Fair Labor Standards Act to be guided in the application of that act by rulings of the National Labor Relations Board³ gives added emphasis to jurisdictional findings by the Board.

All the cases which have been reviewed by the Supreme Court have been approved insofar as the exercise of jurisdiction by the Board is concerned. Of these, the *Jones and Laughlin Steel Corporation* case is first in importance. In approving the constitutionality of the National Labor Relations Act, the Court gave in broad outline the guiding theory applicable to the test of federal power to control:

"Although activities may be intrastate in character when separately considered, if they have such a close and substantial

* Established by the National Labor Relations Act, § 3, 49 Stat. 449, 451 (1935), 29 U.S.C.A. § 153 (Supp. 1938).

1. N.L.R.B. v. Jones and Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937); Associated Press v. N.L.R.B., 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937); N.L.R.B. v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 57 S.Ct. 645, 81 L.Ed. 921 (1937); N.L.R.B. v. Fruehauf Trailer Co., 301 U.S. 49, 57 S.Ct. 642, 81 L.Ed. 918 (1937); Washington, Virginia and Maryland Coach Co. v. N.L.R.B., 301 U.S. 142, 57 S.Ct. 648, 81 L.Ed. 965 (1937); Consolidated Edison Co. v. N.L.R.B., 59 S.Ct. 206, 83 L.Ed. 131 (1938); Santa Cruz Fruit Packing Co. v. N.L.R.B., 303 U.S. 453, 58 S.Ct. 656, 82 L.Ed. 954 (1938).

2. See Despres and Myer, The National Labor Relations Board—Decisions of its First Year (1936) 4 U. of Chi. L. Rev. 97.

3. 3 Labor Rel. Rep. 91 (1938).

relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. . . . The question is one *necessarily of degree*.”⁴

The Supreme Court thus disposed of notions concerning the limitations of federal power over manufacturing and production activities that were prevalent under its expressions in earlier cases⁵ and threw the whole problem of national control into the uncertainty inherent in problems of “degree.” Subsequent decisions⁶ by the Court have followed this theory without throwing much additional light on the proper manner of weighing the relationship encountered in any given case to determine whether it is “close and substantial.”⁷

Nor have the decisions of the Circuit Courts of Appeals done much to clarify this situation. These courts have approved the exercise of jurisdiction in all but three cases presented.⁸ It seems that the criterion which has served as a guide in all the decisions is the *degree* of dependence of the particular business upon, and its connection with, interstate commerce.⁹ Of the three decisions

4. *N.L.R.B. v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 S.Ct. 615, 624, 81 L.Ed. 893, 911 (1937) (italics supplied). This rule was repeated in the Court's most recent opinion in the following words: “And whether or not particular action in the conduct of intrastate enterprises does affect that [interstate] commerce in such a close and intimate fashion as to be subject to federal control, is left to be determined as individual cases arise.” *Consolidated Edison Co. v. N.L.R.B.*, 59 S.Ct. 206, 214, 83 L.Ed. 131 (1938).

5. *United Mine Workers v. Coronado Co.*, 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975, 27 A.L.R. 762 (1922); *United Leather Workers' v. Herkert and Meisel Trunk Co.*, 265 U.S. 457, 44 S.Ct. 623, 68 L.Ed. 1104, 33 A.L.R. 566 (1924); *Industrial Association v. United States*, 268 U.S. 64, 45 S.Ct. 403, 69 L.Ed. 849 (1925); *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295, 45 S.Ct. 551, 691 L.Ed. 963 (1925). See also *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936).

6. See cases cited in note 1, *supra*.

7. *N.L.R.B. v. Fruehauf Trailer Co.*, 301 U.S. 49, 57 S.Ct. 642, 81 L.Ed. 918 (1937), where the jurisdiction of the N.L.R.B. was sustained because 99.57 per cent of raw materials obtained outside state and 82.8 per cent of finished products shipped out. In the case of *N.L.R.B. v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 57 S.Ct. 645, 81 L.Ed. 921 (1937), there was constant flow of raw materials and finished products across state lines to and from respondent, but the Court's refusal in the *Consolidated Edison* case to consider the source of the company's operating materials may indicate that no great support for jurisdiction would be found in such facts.

8. *Foster Bros. Mfg. Co. v. N.L.R.B.*, 85 F. (2d) 984 (C.C.A. 4th, 1936); *N.L.R.B. v. Fainblott*, 98 F. (2d) 615 (C.C.A. 3rd, 1938); *N.L.R.B. v. Idaho-Maryland Mines Corp.*, 98 F. (2d) 129 (C.C.A. 9th, 1938).

9. *N.L.R.B. v. Hopwood Retinning Co., Inc.*, 98 F. (2d) 97 (C.C.A. 2nd, 1938) (23 per cent of its business in interstate commerce). *Standard Lime and Stone Co. v. N.L.R.B.*, 97 F. (2d) 531 (C.C.A. 4th, 1938) (83 per cent of product sold outside of state). *N.L.R.B. v. Carlisle Lumber Co.*, 94 F. (2d) 138 (C.C.A. 9th, 1937) (all operations within the state but 90 per cent of product shipped outside).

disagreeing with the Board's exercise of jurisdiction, one¹⁰ obviously cannot stand in the light of decisions by the Supreme Court subsequently rendered, and the others¹¹ are at least of doubtful validity.

In the exercise of its granted power to make regulations in all labor disputes burdening and obstructing the free flow of interstate commerce, the Board has considered a great variety of cases. The factors which it has deemed important¹² in pursuing the course charted by decisions of the Supreme Court will appear from the following review of the Board's rulings.

Activities Directly in Interstate Commerce

Enterprises which are directly in interstate commerce have readily been found subject to the Act. These have included: the transportation of freight and passengers between countries;¹³ the activities of those acting as agents for others who admittedly do interstate business;¹⁴ the affairs of enterprises engaged in communication across state and foreign boundaries¹⁵ and in the widespread gathering and disseminating of information¹⁶ or news across state lines;¹⁷ the operation of a truck line, although no state lines are crossed,¹⁸ and even if operation is confined wholly within a single city;¹⁹ an intrastate unit of transportation serving in an interstate network,²⁰ or engaged in ferrying across a body of water within the state.²¹

10. *Foster Bros. Mfg. Co. v. N.L.R.B.*, 85 F. (2d) 984 (C.C.A. 4th, 1936).

11. *N.L.R.B. v. Fainblott*, 98 F. (2d) 615 (C.C.A. 3rd, 1938); *N.L.R.B. v. Idaho-Maryland Mines Corp.*, 98 F. (2d) 129 (C.C.A. 9th, 1938).

12. See *Mueller, Businesses Subject to the National Labor Relations Act* (1937) 35 Mich. L. Rev. 1286.

13. *In re France Lines*, 3 N.L.R.B. 64 (1937); *In re Cosmopolitan Shipping Co., Inc.*, 2 N.L.R.B. 759 (1937).

14. *In re Globe Service, Inc.*, 2 N.L.R.B. 610 (1937).

15. *In re Mackay Radio and Telegraph Co.*, 2 N.L.R.B. 500 (1936), jurisdiction affirmed, 87 F. (2d) 611 (C.C.A. 9th, 1937) (but petition of N.L.R.B. for enforcement of its order denied on other grounds).

16. *In re Consumers' Research, Inc.*, 2 N.L.R.B. 57 (1936).

17. *In re The Associated Press*, 1 N.L.R.B. 686 (1936), affirmed, 85 F. (2d) 56 (C.C.A. 2nd, 1936).

18. *In re Central Truck Lines, Inc.*, 3 N.L.R.B. 317, 326 (1937): "The respondent is engaged in the operation of a truck line which carries freight in interstate commerce. All its employees, although they may not be actually conducting the freight across state lines, perform some function necessary to that interstate transportation. Any interruption in the performance of that function would interfere with interstate commerce."

19. *In re Houston Cartage Co., Inc.*, 2 N.L.R.B. 1000 (1937).

20. *In re Santa Fe Trail Transportation Co.*, 2 N.L.R.B. 767 (1937).

21. *In re Delaware-New Jersey Ferry Co.*, 1 N.L.R.B. 85 (1935), 90 F. (2d) 520 (C.C.A. 3rd, 1937) (petition to enforce order of N.L.R.B. denied on other than jurisdictional grounds). The respondent objected to the jurisdiction of the Board contending that since the slips to and from which it proceeded

Businesses Constituting an Integral Part of Interstate Commerce

Likewise, businesses producing or working upon the instrumentalities of interstate commerce have been held within the jurisdiction of the Board. Even though the particular concern is not directly engaged in interstate commerce, if a cessation of its operations would directly interfere with the movement of commerce, then under the decisions of the Board it is subject to the Act.

In the first case²² decided by the Board, it was held that a labor dispute in an interstate bus-servicing garage would interfere with interstate transportation, thus causing a burden upon commerce which the Act was designed to prevent.²³ This view has been reaffirmed in subsequent similar cases.²⁴ The theory that the business is an integral and necessary part of interstate commerce has also been applied to concerns engaged in the following activities: furnishing tugboat assistance to ocean-going vessels;²⁵ conducting interstate warehouse services;²⁶ in the manufacture and installation of motors for, and the use of an experimental field by, commercial airships;²⁷ the repair of fishing vessels which go outside the three mile limit;²⁸ the supplying of longshoremen for the purpose of unloading and reloading coal on interstate carriers;²⁹ the furnishing of watchmen and guards to various shipping companies for the purpose of guarding freight received from interstate vessels;³⁰ the repairing of private automobiles;³¹ and the operation of stockyards facilitating the shipment of meats.³²

Even though a company is not itself directly engaged in in-

were entirely in Delaware waters, it was therefore not engaged in such commerce. In support of its view the respondent cited *The Daniel Ball*, 77 U.S. 557, 19 L.Ed. 999 (1871).

22. In re Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B. 1 (1935), order of N.L.R.B. modified on other than jurisdictional grounds, 91 F. (2d) 178 (C.C.A. 3rd, 1937).

23. National Labor Relations Act, § 2 (3, 6), 49 Stat. 449, 450 (1935); 29 U.S.C.A. § 152 (Supp. 1935).

24. In re New England Transportation Co., 1 N.L.R.B. 130 (1936); In re Washington, Virginia & Maryland Coach Co., 1 N.L.R.B. 769 (1936), order enforced, 85 F. (2d) 990 (C.C.A. 4th, 1936), affirmed, 301 U.S. 142, 57 S.Ct. 648, 81 L.Ed. 965 (1937).

25. In re Gawanas Towing Co., Inc., Case R-634 (Aug. 5, 1938).

26. In re Santa Cruz Fruit Packing Co., 1 N.L.R.B. 454 (1936), order modified so as not to affect workers at plant not making interstate shipments, 91 F. (2d) 790 (C.C.A. 9th, 1937).

27. In re United Aircraft Mfg. Corp., 1 N.L.R.B. 236 (1936).

28. In re Harbor Boat Bldg. Co., 1 N.L.R.B. 349 (1936).

29. In re Frederick R. Barrett, 3 N.L.R.B. 513 (1937).

30. In re Williams Dimond and Co., 2 N.L.R.B. 859 (1937).

31. In re Nolan Motor Co., Inc., 2 N.L.R.B. 357 (1936).

32. In re St. Joseph Stock Yards Co., 2 N.L.R.B. 39 (1936).

terstate commerce or working upon the instrumentalities thereof, if other businesses or activities that are directly or indirectly engaged in interstate commerce, such as telegraph and railroad systems or the furnishing of navigation lights, are dependent upon its service, the Board has jurisdiction. Thus the Board has held that any labor dispute which may tend to disrupt this service comes within its jurisdiction because of the possible burdening effect upon the smooth flow of commerce.³³ Likewise, businesses making use of power generated outside the state have been held to be under the jurisdiction of the Board.³⁴ The Board's exercise of jurisdiction in such cases was approved in general by the Supreme Court in one of its most recent decisions.³⁵

Businesses Producing for Interstate Commerce

In keeping with decisions of the Supreme Court, manufacturing establishments which produce goods for shipment in interstate commerce come under the jurisdiction of the National Labor Relations Board.³⁶ Although the business may do most of its purchasing and selling within the state, if it ships on interstate carriers,³⁷ or uses any route which goes outside the boundaries of the state,³⁸ it may be held subject to the Act. The cases indicate that even though the initial movement of the goods is not in interstate commerce, jurisdiction would exist if, for example, the purchaser is a mail-order house,³⁹ a chain-store,⁴⁰ or jobber,⁴¹ or if in the natural course of the purchaser's business the product will enter interstate commerce.⁴²

As these cases indicate, the National Labor Relations Board will take the subsequent disposal of the goods into consideration in determining its jurisdiction over the original seller. But these

33. *In re Pacific Gas and Electric Co.*, 3 N.L.R.B. 835 (1937); *In re Consolidated Edison Co. of New York, Inc.*, 4 N.L.R.B. 71 (1937), jurisdiction approved but order modified on other grounds, 59 S.Ct. 206, 83 L.Ed. 131 (1938).

34. *In re Tupelo Garment Co.*, 7 N.L.R.B. No. 52 (1938).

35. *Consolidated Edison Co. v. N.L.R.B.*, 59 S.Ct. 206, 83 L.Ed. 131 (1938).

36. *In re Canton Enameling and Stamping Co.*, 1 N.L.R.B. 402 (1936); *In re Belmont Stamping and Enameling Co.*, 1 N.L.R.B. 378 (1936); *In re Brown Shoe Co., Inc.*, 1 N.L.R.B. 803 (1936); *In re Wheeling Steel Corp.*, 1 N.L.R.B. 699 (1936).

37. *In re The Ontario Knife Co.*, 4 N.L.R.B. 29 (1937).

38. *In re Shipowners' Association of Pacific Coast*, 7 N.L.R.B. No. 120 (1938); see also *In re D. and H. Motor Freight Co.*, 2 N.L.R.B. 231 (1936).

39. *In re Hardwick Stove Co. Inc.*, 2 N.L.R.B. 78 (1936).

40. *In re Somerset Shoe Co.*, 5 N.L.R.B. 486 (1938).

41. *In re Somerset Shoe Co.*, 5 N.L.R.B. 486 (1938); *In re Empire Worsted Mills, Inc.*, 6 N.L.R.B. 513 (1938).

42. *In re Petroleum Iron Works Co.*, 4 N.L.R.B. 959 (1938).

decisions do not indicate whether the time element with respect to subsequent movements in interstate commerce would have any effect on its jurisdictional finding. In one case, however, the Board seems to have taken into consideration the universal use of the product (carbon black) and thus inferred that its production would ultimately have an effect on interstate commerce.⁴³ In keeping with the foregoing, the decisions show the futility of pleading that the title of the goods passed to the purchaser before they left the state⁴⁴ or that the respondent never at any time held title to the goods,⁴⁵ although a recent decision of the Circuit Court of Appeals supports a contrary view.⁴⁶

Businesses Dependent on Interstate Commerce for Supplies

Just as the use of the channels of interstate commerce in the marketing or distribution of the products in which an establishment is dealing may result in federal power to control its labor relations, so has the dependence of a business on interstate commerce for its sources been used as a basis for jurisdiction. Thus the direct dependence upon interstate commerce for raw materials⁴⁷ or machinery and operating equipment⁴⁸ has been considered as conferring jurisdiction on the Board. And even if the immediate source is local, the prior interstate movement of materials may subject the business to the Act.⁴⁹ In holding newspaper-publishing within the operation of the statute, the Board has relied on the receipt of national advertising revenue,⁵⁰ the use of syndicated material⁵¹ and newsprint, ink and wrapping material⁵² coming from outside the state, membership in the Asso-

43. In re United Carbon Co., Inc., 7 N.L.R.B. No. 78 (1938).

44. In re Botany Worsted Mills, 4 N.L.R.B. 292 (1937).

45. In re California Wool Scouring Co., 5 N.L.R.B. 782 (1938).

46. N.L.R.B. v. Fainblott, 98 F. (2d) 615 (C.C.A. 3rd, 1938); N.L.R.B. v. Idaho-Maryland Mines Corp., 98 F. (2d) 129 (C.C.A. 9th, 1938).

47. In re Baer Co. Inc., 1 N.L.R.B. 159 (1936); In re Pioneer Pearl Button Co., 1 N.L.R.B. 837 (1936); In re Beaver Mills-Lois Mill, 1 N.L.R.B. 147 (1936); In re United States Stamping Co., 1 N.L.R.B. 123 (1936); In re Radiant Mills Co., 1 N.L.R.B. 274 (1936); In re Bendix Products Corp., 1 N.L.R.B. 173 (1936); In re Saxon Mills, 1 N.L.R.B. 153 (1936).

48. In re Standard Lime and Stone Co., 5 N.L.R.B. 106, 109 (1938); In re The Novelty Steam Boiler Works, 7 N.L.R.B. No. 116 (1938). In both these cases, machinery and equipment were purchased out of state.

49. In re Brown-Saltman Furniture Co., 7 N.L.R.B. No. 136 (1938): "A small amount of these materials are procured by the Company *directly* from sources outside the State; the remainder through *jobbers* whose sources of supply are located in other States and territories of the United States." (Italics supplied.)

50. In re Citizen-News Co., 8 N.L.R.B. No. 123 (1938).

51. In re The A. S. Abell Co., 5 N.L.R.B. 644 (1938), jurisdiction of Board approved, but order modified on other grounds, 97 F. (2d) 951 (C.C.A. 4th, 1938).

52. In re Edward E. Cox, Printer, Inc., 1 N.L.R.B. 594 (1936):

ciated Press,⁵³ and the purchase of operating equipment or replacement parts from out of state.⁵⁴

Facts Considered of Evidential Value

The Board's practice of attaching evidential value to a variety of facts in assuming jurisdiction is a further complication that increases the difficulty of discovering a standard by which the power to control may be determined. In supporting its assumption of jurisdiction, the Board has pointed to such facts as the registration of stock issues with the Securities and Exchange Commission,⁵⁵ the use of commission brokers,⁵⁶ or stationary sales representatives,⁵⁷ the employment of traveling salesmen,⁵⁸ the application for and use of trade marks,⁵⁹ the incidental interstate movement of raw materials and finished goods,⁶⁰ advertising in national publications⁶¹ and by means of the radio,⁶² the securing of a license to transact business as a foreign corporation,⁶³ the application for and receipt of the meat inspection service of the Department of Agriculture,⁶⁴ statements made in legal proceedings,⁶⁵ or statements in a prospectus issued in connection with a sale of bonds,⁶⁶ and finally, the extent of the market in which the business competes with manufacturers in other parts of the nation.⁶⁷ The last-mentioned fact suggests that the existence of competition between a local product and a product interstate in origin *may* justify the exercise of jurisdiction. Although the presence of factors of this kind may not alone be controlling, their significance cannot be overlooked.

53. In re The A. S. Abell Co., 5 N.L.R.B. 644 (1938), jurisdiction of Board approved, but order modified on other grounds, 97 F. (2d) 951 (C.C.A. 4th, 1938).

54. In re Citizen-News Co., 8 N.L.R.B. No. 123 (1938).

55. In re Fedders Mfg. Co., 3 N.L.R.B. 818 (1937); In re Allis-Chalmers Mfg. Co., 4 N.L.R.B. 159 (1937).

56. In re Hubinger Co., 4 N.L.R.B. 428 (1937).

57. In re Rollway Bearing Co., 1 N.L.R.B. 651 (1936).

58. In re Atlas Mills, Inc., 3 N.L.R.B. 10 (1937).

59. In re International Nickel Co., Inc., 1 N.L.R.B. 907 (1936); In re John Blood and Co., Inc., 1 N.L.R.B. 371 (1936).

60. In re Mann Edge Tool Co., 1 N.L.R.B. 977 (1936); In re Columbian Enameling and Stamping Co., 1 N.L.R.B. 181 (1936).

61. In re National Casket Co., Inc., 1 N.L.R.B. 963 (1936); In re Chrysler Corp., 1 N.L.R.B. 164 (1936).

62. In re Horton Mfg. Co., 6 N.L.R.B. 2 (1938).

63. In re Highway Trailer Co., 3 N.L.R.B. 591 (1937).

64. In re John Minder and Son, Inc., 6 N.L.R.B. 764 (1938). This service is only supplied to firms engaged in interstate commerce (6 N.L.R.B. at 765).

65. In re Altorfer Brothers Co., 5 N.L.R.B. 713 (1938).

66. In re Whiterock Quarries, Inc., 5 N.L.R.B. 601 (1938).

67. In re Wallace Mfg. Co., Inc., 2 N.L.R.B. 1081 (1937), affirmed, 95 F. (2d) 818 (C.C.A. 4th, 1938).

CONCLUSION

As shown by the foregoing survey there may be power to control with respect to any process from initial production of the raw product to its final delivery to the consumer as a finished article, if movement in interstate commerce intervenes. If, anywhere along the line, labor strife would tend to affect the flow of a commodity through the interstate channels of trade and commerce, the power of the Board may be felt. But direct interference with a "flow" is not necessary. That is, the activity in question may affect interstate commerce although the "flow" has not yet begun or has already ended. Original production of a commodity to be moved in interstate commerce is intimately connected with such movement, and likewise, the subsequent working upon or handling thereof will have a direct connection.

A troublesome problem arises from the possibility of a break in the interstate movement which may result in the activities in question affecting commerce only *remotely* or *unsubstantially*. Although the production of goods for shipment in interstate commerce may confer jurisdiction, what if the things produced do not move *directly* in such commerce? The Circuit Court of Appeals for the Ninth Circuit reversed a Board order for lack of jurisdiction on a finding that the gold mined by the company was all sold within the state and that no substantial out of state purchases of material were made.⁶⁸ This reversal occurred notwithstanding the facts that the gold, after being commingled with other gold secured elsewhere by the purchaser, was subsequently shipped out of state, and also that about \$125,000 of operating materials used by the company were obtained from outside the state. The existence of such a break, of course, makes original production activities more "*remote*" or "*distant*" from the commerce that they may affect. Although no mathematical formula may be prescribed to determine when a given effect may be properly called "substantial,"⁶⁹ greater exactness seems possible on the question of "remoteness." Subsequent decisions can do much to point the way.

Various problems are suggested by the cases such as whether jurisdiction would exist if the labor trouble occurs in a seasonal business at a time when no production is in progress,⁷⁰ or when

68. In re Idaho-Maryland Mines Corp., 4 N.L.R.B. 784 (1938); reversed, N.L.R.B. v. Idaho-Maryland Mines Corp., 98 F. (2d) 129 (C.C.A. 9th, 1938).

69. Santa Cruz Fruit Packing Co. v. N.L.R.B., 303 U.S. 453, 58 S.Ct. 656, 82 L.Ed. 954 (1938).

70. In re North Whittier Heights Citrus Ass'n, 6 N.L.R.B. No. 18 (1938).

no shipments are being made or received,⁷¹ or if sufficient goods to continue regular shipments despite the labor trouble are in storage,⁷² or if the business can still continue to operate just as efficiently without hindrance to the interstate movement of goods.⁷³ Obviously such questions lead back to the meaning of "close and substantial" and to the problem of "degree." Until the Supreme Court has spoken more definitely, no satisfying formula for their solution can be devised.

In one case⁷⁴ a business was found subject to the Act although the conduct of only one department thereof affected interstate commerce. There was a finding however that the personnel of the various departments was overlapping. Whether complete segregation would suffice to escape the operation of the Act has not been decided by the Board. The solution to this question would perhaps depend upon a factual showing that a labor dispute in a department not engaged in interstate commerce would or would not interfere with the functioning of the department affecting such commerce.

In all the cases decided by the Supreme Court where the issue of lack of jurisdiction was raised, the standard approach has been to examine the actual extent of dependence upon interstate commerce of the particular business. However, it has been suggested that the actual amount of the manufactured product which moves in interstate commerce is unimportant so long as some portion of it does. The position was that if even one per cent moved in interstate commerce the effect of labor troubles preventing or obstructing such movement would be direct and immediate, with resulting jurisdiction in the Board.⁷⁵ Perhaps the solution to this problem lies in the meaning of the word "degree" as employed by the Supreme Court in the *Jones and Laughlin* case.⁷⁶ If the ref-

71. In re Rex Mfg. Co., 7 N.L.R.B. No. 16 (1938).

72. In re Louis Hornick and Co., Inc., 2 N.L.R.B. 983 (1937); In re The Warfield Co., 6 N.L.R.B. 58 (1938).

73. In re Kentucky Firebrick Co., 3 N.L.R.B. 455 (1937), affirmed, 99 F. (2d) 89 (C.C.A. 6th, 1938); In re Sheba Ann Frocks, Inc., 5 N.L.R.B. 12 (1938).

74. In re Wald Transfer and Storage Co., Inc., 3 N.L.R.B. 712 (1937).

75. "... it is plain to see that interstate commerce is obstructed, because production of goods was halted by the unfair labor practice. I do not believe that it is important whether 98 per cent of respondent's production or only 1 per cent of it, actually moved in interstate commerce. So long as 1 per cent so moved, the unfair labor practice obstructed the movement to that extent. The effect would therefore be direct and immediate." Haney, J., in N.L.R.B. v. Santa Cruz Fruit Packing Co., 91 F. (2d) 790, 796 (C.C.A. 9th, 1937), noted in (1938) 12 Tulane L. Rev. 302.

76. N.L.R.B. v. Jones and Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937), cited supra note 4. See also the language of Haney, J., in note 75, supra.

erence here is to the directness or remoteness of the effect on interstate commerce, then the view just stated is perhaps correct. However, if this expression refers to the "extent" of the effect on such commerce, such a view cannot stand. Considered in connection with the expression "close and substantial" which immediately precedes the use of the word "degree" in the *Jones and Laughlin* opinion, the latter meaning is indicated. This position is further supported by the statements in the *Santa Cruz* case that "the provision cannot be applied by a mere reference to percentages" and "The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have such a *close and substantial* relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes."⁷⁷ In short, if one per cent of the output of a plant would have such an effect then jurisdiction would exist, if not, there would be an absence of power to control. The decisions of the Board seem to follow this view.

SIDNEY W. JACOBSON

TACIT RECONDUCTION—A NEW LEASE

A lease is said to be *tacitly reconducted*¹ when, upon the expiration of its term and without opposition by the lessor, the tenant remains in possession of the leased premises. The terms and conditions of the original agreement remain operative by reason of a legal presumption that this is the wish of the parties. To demonstrate that in Louisiana law² this tacit reconduction operates to create a *new* though implied agreement between the

77. *Santa Cruz Fruit Packing Co. v. N.L.R.B.*, 303 U.S. 453, 467, 58 S.Ct. 656, 661, 82 L.Ed. 954 (1938) (italics supplied).

1. Arts. 2688, 2689, La. Civil Code of 1870.

"*C'est la continuation de la jouissance d'une ferme ou d'une maison au prix et aux conditions que portait le bail qui est expiré, et qui n'a point été renouvelé.*" 13 Merlin, Répertoire de Jurisprudence (4 ed. 1815) 379, vo. Tacite Reconduction.

"It is the continuation of the enjoyment of a farm or of a house at the same price and conditions which attached to the lease which has expired, and which has not been [expressly] renewed." (Translation by author.)

2. For the language of Articles 2688 and 2689, La. Civil Code of 1870, see text, *infra* p. 444.

parties and not a mere continuation of the original lease, is the purpose of this comment.³

The theory of reconduction is inescapably bound up with those provisions of law which treat of the *duration* of leases. It would therefore be well to preface any discussion of the nature of the reconducted lease with a brief investigation of the articles of the Civil Code dealing with the manner in which agreements of lease expire.

Article 2684 introduces this subject by enunciating the general rule that "the duration and the conditions of leases are generally regulated by contract, or by mutual consent." But the two following articles⁴ then take up the situation where, with reference to a lease of urban property, the parties have not contracted and have not mutually consented concerning the duration of the lease. Article 2685 declares:

"If the renting of a house or other edifice, or an apartment,

3. The establishment of this view would have wide effect. For example, if reconduction creates a new though tacit convention, it cannot operate when one of the parties is incapable of contracting. 10 Huc, *Commentaire Théorique et Pratique du Code Civil* (1897) 452, n° 334; 17 Duranton, *Cours de Droit Français* (3 ed. 1834) 144, n° 171; 4 Pothier, *Oeuvres* (Bugnet ed. 1861) 120, *Traité du Contrat de Louage*, n° 345; Troplong, *Droit Civil Expliqué, De l'Echange et du Louage*, II (3 ed. 1859) 7, n° 453; 20 Baudry-Lacantinerie, *Traité de Droit Civil, Du Contrat de Louage*, I (3 ed. 1906) 824, n° 1423; *Corpus Juris Civilis*, D.19.2.14. Further, where the validity of a lease is dependent upon the approval of the court, as is sometimes the case in the administration of property by a tutor or curator (Art. 346, *La. Civil Code* of 1870; *La. Act* 116 of 1920, § 1, construed with *Act* 47 of 1934, § 1, as amended by *Act* 18 of 1935 [2 E.S.] § 1), no question of reconduction could arise, since the mere action or inaction of the parties could not, of itself, consummate a contract. Finally, in the field of liens and privileges, the determination of priority between the lessor's lien and the right of the mortgagee of the lessee's movables present upon the leased premises, is dependent upon the effect of reconduction in the case where the mortgagee records his mortgage after the execution of the lease but before its reconduction and the lessor is invoking his lien to recover rents falling due after the reconduction. *Remedial Loan Society v. Solis and Trepagnier*, 1 *La. App.* 164 (1924); *Comegys v. Shreveport Kandy Kitchen*, 162 *La.* 103, 110 *So.* 104, 52 *A.L.R.* 931 (1926), reversing 3 *La. App.* 692; and *McKesson Parker Blake Corporation v. Eaves & Reddit*, 149 *So.* 294 (*La. App.*, 1933).

4. Articles 2685 and 2686 were enacted in their present form as Articles 2655 and 2656 of the *Civil Code* of 1825. Neither article appeared in the *Civil Code* of 1808; however, the corresponding provision in that code was *La. Civil Code* of 1808, p. 374, Art. 11: "If in letting out a room or a house no time has been stipulated, the duration of said lease shall be at the will of either of the parties.

"But it shall be the duty of the party who wishes to cancel the lease, to give notice of the same to the other party. That notice must be given a month beforehand when the rent is payable quarterly and fifteen days only when the rent is payable by the month."

The period of notice required by Art. 2686 (*La. Civil Code* of 1870) (Art. 2656, *La. Civil Code* of 1825) was originally fifteen days, but was changed by *Act* 9 of 1924 to ten days.

has been made without fixing its duration, the lease shall be considered to have been made *by the month*." (Italics supplied.)

And according to Article 2686:

" . . . If no time for its duration has been agreed on, the party desiring to *put an end to it* must give notice in writing to the other, at least ten days before the expiration of the month, which has begun to run." (Italics supplied.)

It is apparent from these articles that our code draws a sharp distinction, at least with respect to urban property, between those leases which have a definite duration specified in the agreement and those which are silent in this regard. The former type terminate of their own effect upon the expiration of the time stipulated; whereas, the latter are considered as continuing indefinitely month by month, though terminable by either party at the end of any current month by the giving of timely written notice to the other.⁵

The same distinction, however, is not observed with respect to the leasing of farm lands. Article 2687 declares:

"The lease of a predial estate, when the time has not been specified, is presumed to be *for one year* as that time is necessary in this State to enable the farmer to make his crop, and to gather in all the produce of the estate which he has rented." (Italics supplied.)

Thus, the law here supplies a definite term where the parties

5. The French Civil Code draws a like distinction. 10 Huc, op. cit. supra note 3, at 448-9, n° 331. Following is the text of the corresponding French articles with translations by the author:

Art. 1736, French Civil Code: "*Si le bail a été fait sans écrit, l'une des parties ne pourra donner congé à l'autre qu'en observant les délais fixés par l'usage des lieux.*"

(Translation) "If the lease was made *without a stipulated duration*, one of the parties can give notice to the other only in accordance with the delays fixed by the custom of the locality." (Italics supplied.)

Art. 1737, French Civil Code: "*Le bail cesse de plein droit à l'expiration du terme fixé, lorsqu'il a été fait par écrit, sans qu'il soit nécessaire de donner congé.*"

(Translation) "The lease terminates by the operation of law at the expiration of the term specified, *when the duration has been fixed*, without the necessity of giving notice." (Italics supplied.)

The terms "*écrit*" and "*sans écrit*," as used here, do not have the literal meaning of these words. The former description refers specifically to a lease with a definite duration fixed by the parties; whereas, the latter refers to a lease of indefinite duration. Either type of lease may be written or verbal. 2 Colin et Capitant, Cours Élémentaire de Droit Civil Français (8 ed. 1935) 613, n° 671; 6 Marcadé, Explication du Code Napoléon (7 ed. 1875) 495; 10 Planiol et Ripert, Traité Pratique de Droit Civil Français (1932) 786, n° 624.

have neglected to declare their intention.⁶ Unlike the urban lease, the lease of farm lands always has a definite term. It is fixed, either by the terms of the agreement itself or by provision of law.

Because reconduction can attach only to those leases which have expired,⁷ this difference in the treatment of rural and urban

6. Where the parties fail to fix the duration of rural leases, a definite term is likewise established by the French Civil Code. 3 Mourlon, Répétitions Ecrites sur le Code Napoléon (4 ed. 1856) 289, at Arts. 1774-1776; 6 Marcadé, op. cit. supra note 5, at 532; 20 Baudry-Lacantinerie, op. cit. supra note 3, at 701, n° 1226. The corresponding French articles read as follows: (Translations by the author.)

Art. 1774, French Civil Code: "*Le bail, sans écrit, d'un fonds rural, est censé fait pour le temps qui est nécessaire afin que le preneur recueille tous les fruits de l'héritage affermé.*"

"*Ainsi le bail à ferme d'un pré, d'une vigne, et de tout autre fonds dont les fruits se recueillent en entier dans le cours de l'année, est censé fait pour un an.*"

"*Le bail des terres labourables, lorsqu'elles se divisent par soles ou saisons, est censé fait pour autant d'années qu'il y a de soles.*"

(Translation) "The rural lease without stipulated duration is deemed to be made for the time necessary for the farmer to harvest all the crops of the leased property."

"Thus, the rural lease of a pasture, a vineyard, and any other land, the fruits of which are completely harvested in the course of the year, is deemed to be made for a year."

"The lease of arable lands, when these rotate as to fallows or seasons, is deemed to be made for as many years as the period of rotation requires." (Italics supplied.)

Art. 1775, French Civil Code: "*Le bail des héritages ruraux, quoique fait sans écrit, cesse de plein droit à l'expiration du temps pour lequel il est censé fait, selon l'article précédent.*"

(Translation) "The lease of rural property, even though made with no stipulated duration, terminates by the operation of law at the expiration of the time for which it is deemed to be made according to the preceding article."

However, by the Law of October 24, 1919, Article 1775 was amended to read as follows:

"*Le bail des héritages ruraux, quoique fait sans écrit, ne cesse à l'expiration du terme fixé par l'article précédent que par l'effet d'un congé donné par écrit par l'une des parties à l'autre, six mois au moins avant ce terme.*"

"*A défaut d'un congé donné dans le délai ci-dessus spécifié, il s'opère un nouveau bail dont l'effet est réglé par l'article 1774 (1).*"

(Translation) "The lease of rural property, even though made with no stipulated duration, terminates at the expiration of the term fixed by the preceding article only by effect of a written notice given by one of the parties to the other at least six months before [the end of] the term."

"In default of such a notice, a new lease comes into operation, the effect of which is regulated by article 1774 (1)."

It is doubtful that this amendment made any real change in the principle above referred to. The writer submits that it merely establishes a special type of tacit reconduction for rural leases without a conventional term. It would seem to allow reconduction to operate, in such a case, by the mere failure of either party to give notice, without the necessity of a "holding-over" by the tenant.

7. This is clear from the language of Articles 2688 and 2689 (La. Civil Code of 1870), both of which refer to the lease having "expired." For the language of these articles, see text, infra p. 444. The French law is to the same effect. See 10 Planiol et Ripert, op. cit. supra note 5, at 790, n° 627; 25 Lau-

leases is of great significance in determining the applicability of the principle of reconduction in the case where the parties *have neglected to fix a term*. Farm leases of no stipulated duration expire at the end of the term fixed by law, and may therefore be reconducted by a "holding-over" by the lessee.⁸ But the urban lease with no stipulated duration has no definite term which can expire and is therefore not normally the subject of reconduction.⁹

From the very fact that reconduction applies only to those leases which have *expired*, the conclusion would seem to be inevitable that any continuance of the lessor-lessee relationship must be in the nature of a *new* convention, as a contract which has expired can have no further operation unless renewed or extended by force of a new agreement, expressed or implied. Consequently, it at first seems strange to note that our courts have adopted the view that reconduction operates by mere force of law apart from any new agreement of the parties.¹⁰

rent, *Principes de Droit Civil Français* (1877) 370, n° 331; 2 Planiol, *Traité Élémentaire de Droit Civil* (11 ed. 1937) 641, n° 1732; 20 Baudry-Lacantinerie, *op. cit. supra* note 3 at 812, n° 1406.

8. Troplong, *op. cit. supra* note 3, at 205-206, nos 770-772; 17 Duranton, *op. cit. supra* note 3, at 196, n° 215; 6 Marcadé, *op. cit. supra* note 5, at 532-533. See also 20 Baudry-Lacantinerie, *op. cit. supra* note 3, at 810, n° 1402.

9. When one of the parties has given notice of termination according to Art. 2686, La. Civil Code of 1870, the lease will expire at the end of the current month. Since the term of the lease thus becomes fixed, it may be possible for reconduction to result from the subsequent "holding-over" by the tenant. Where the notice is given by the lessor, it may also prevent reconduction. Art. 2691, La. Civil Code of 1870, declares: "When notice has been given, the tenant, although he may have continued in possession, can not pretend that there has been a tacit renewal of the lease." This notice to prevent reconduction is not the same as the notice required to terminate a lease with no stipulated duration. 20 Baudry-Lacantinerie, *op. cit. supra* note 3, at 812, n° 1406; 25 Laurent, *op. cit. supra* note 7, at 379-380, n° 339. Consequently, one view holds that reconduction may operate in such a situation. 20 Baudry-Lacantinerie, *supra*, at 817, n° 1413. However, another view considers that even a notice of termination will prevent the operation of reconduction because of the fact that it shows a contrary intention. 25 Laurent, *supra*, at 379, n° 331.

The Louisiana courts have mistakenly applied the principle of reconduction to termless urban leases even when no notice has been given. Remedial Loan Society v. Solis and Trepagnier, 1 La. App. 164 (1924); McKesson Parker Blake Corporation v. Eaves & Reddit, 149 So. 294 (La. App. 1933); see Hincks v. Hoffman, 12 Orleans App. 218, 225 (1915). These cases proceeded upon the mistaken premise that R.C.C. Article 2685 establishes one month as the duration of urban leases where the parties have not stipulated a term. This idea is amply refuted by the language of that article itself which refers to such leases as presumed to be made *by the month*, and by the language of Article 2686 which declares that the lease may be terminated at the end of any month by advance notice given in writing. Compare the language of Article 2687 regarding rural leases with no stipulated duration which are presumed to be *for one year*.

10. This question has never been accorded the close attention which it deserves. In the case of Bowles v. Lyon, 6 Rob. 262 (La. 1843), Justice Morphy clearly analyzed the whole problem and spoke of the reconducted lease as a

The position of our courts is apparently supported by arguments based upon the language of Articles 2688 and 2689¹¹ dealing with reconduction. These articles read as follows:

Article 2688. "If, after the lease of a predial estate has expired, the farmer should still continue to possess the same during one month without any step having been taken, either by the lessor or by the new lessee, to cause him to deliver up the possession of the estate, *the former lease shall continue* subject to the same clauses and conditions which it contained; but it shall continue only for the year next following the expiration of the lease." (Italics supplied.)

Article 2689. "If the tenant either of a house or of a room should continue in possession for a week after his lease has expired, without any opposition being made thereto by the lessor, *the lease shall be presumed to have been continued*, and he can not be compelled to deliver up the house or room without having received the legal notice or warning directed by article 2686." (Italics supplied.)

Taken literally these texts might support the view that reconduction merely *continues* the original lease. However, a critical analysis from the standpoint of legislative history discloses that the true meaning of these articles is not to be found by a slavish adherence to words used.

In the first place, when we trace the history of the latter article to the Civil Codes of 1808 and 1825, we note that there is a serious discrepancy between the French text (in which these

"new lease." This early case was the basis for less careful generalizations in *Geheebe v. Stanby*, 1 La. Ann. 17 (1846) and *Dolese v. Barberot*, 9 La. Ann. 352 (1854). In *Waples v. City of New Orleans*, 28 La. Ann. 688 (1876), a lease without stipulated duration was properly held to *continue* until terminated by notice under Article 2686—despite abandonment by the lessee. In more recent years, the decisions become increasingly confusing. The case of *Remedial Loan Society v. Solis and Trepagnier*, 1 La. App. 164 (1924) held that reconduction resulted in the formation of a new agreement. But, in *Comegys v. Shreveport Kandy Kitchen*, 162 La. 103, 110 So. 104, 52 A.L.R. 931 (1926), the Supreme Court reversed the second circuit court of appeals, 3 La. App. 692 (1926), to hold that reconduction merely continues the original lease. In *Weeks Supply Co. v. Werdin*, 147 So. 838 (La. App. 1933) and in *McKesson Parker Blake Corporation v. Eaves & Reddit*, 149 So. 294 (La. App. 1933), the *Comegys* case, *supra*, is said to overrule the *Remedial Loan* case, *supra*.

11. These (Arts. 2688 and 2689, La. Civil Code of 1870) were Articles 2658 and 2659 of the Civil Code of 1825. The corresponding provisions of the Civil Code of 1808 are on p. 374, Articles 14 and 15. However, the words *during one month* and *for a week* respectively were not present in the Code of 1808. They first appear in the Code of 1825. See: Proposed Additions and Amendments to the Civil Code of the State of Louisiana (1823), 1 La. Legal Archives (1937) 321.

codes were originally drafted¹²) and the English translation which is now our Article 2689. The French text of the Civil Code of 1808 (p. 375, Art. 15) reads as follows:

"Si le locataire d'une maison ou d'un appartement continue de même sa jouissance après l'expiration du bail, sans opposition de la part du bailleur, *il sera censé les occuper aux mêmes conditions*, et ne pourra plus en sortir, ni en être expulsé qu' après un avertissement ou congé préalable donné au tem(p)s d'avance fixé par l'article XI ci-dessus." (Italics supplied.)

The mistranslation of the first independent clause is almost too obvious to be mentioned. Where the French text, literally translated, merely declares that "he [the tenant] shall be deemed to occupy them [the premises] upon the same conditions," the English version supplies "the lease shall be presumed to have been continued." Since the French text of the Civil Codes of 1808 and 1825 is controlling today in the event of a difference between the French and English versions,¹³ and since the French text in this instance is utterly devoid of any suggestion that the effect of tacit reconduction is to merely continue the original lease, we must conclude that no such inference should be derived from the language of Article 2689.

Reverting now to the language of Article 2688,¹⁴ we find conflicting terminology concerning the effect of reconduction. Although this article declares that the lease "shall continue,"¹⁵

12. Dubuisson, *The Codes of Louisiana (Originals Written in French; Errors in Translation)* (1924) 25 La. Bar Ass'n Rep. 143. See also, Tucker, *Source Books of Louisiana Law* (1932) 6 Tulane L. Rev. 280 (also in 1 La. Legal Archives xvii).

13. *Davis v. Houren*, 6 Rob. 255 (La. 1843); *Buard v. Lemée*, 12 Rob. 243 (La. 1845); *Phelps v. Reinach*, 38 La. Ann 547 (1886); *Strauss v. City of New Orleans*, 166 La. 1035, 118 So. 125 (1923); *Sample v. Whitaker*, 172 La. 722, 135 So. 38 (1931).

14. La. Civil Code of 1870.

15. Article 2688 is substantially taken from Article 25, Book III, Title XIII of the preliminary draft of the French Civil Code known as the *Projet de la Commission du Gouvernement*. The text of that article likewise refers to the continuation of the lease. 2 Fenet, *Recueil Complet des Travaux Préparatoires du Code Civil* (1836) 354. This draft was sent to the various courts of France for criticism, and concerning this article the Tribunal of Paris made the following remarks: "... *l'article 25 aura besoin de quelque amendement. Il y est dit que, dans le cas de la tacite reconduction, le bail se prolonge. L'expression est inexacte; ce n'est point l'ancien bail qui est prolongé, mais un nouveau bail qui se fait.* ..." 5 Fenet, *supra*, at 276.

(Translation) "... article 25 will need some amendment. It is there stated that, in the case of tacit reconduction, *the lease is extended*. The expression is inexact; it is decidedly not the old lease which is *extended*, but a new lease which is made." (Italics supplied.)

its English version contains two, and the French¹⁶ (for here again we encounter faulty translation) three, references to the "expiration" of the lease. Now, as has already been suggested, if the original lease has *expired*, it can be revived or extended only by force of a new agreement to that end. Consequently, the most that can be said of this provision of the Code is that it is ambiguous and must be construed with reference to other provisions of law in *pari materia*.¹⁷

In not one of the Louisiana decisions which discuss the nature of reconduction¹⁸ is mention made of another article of our code which should be of great assistance in reaching a solution of this problem. The reference is to Article 1817¹⁹ which reads as follows:

"Silence and inaction are also, under some circumstances, the means of showing an assent that creates an obligation; if, after the termination of a lease, the lessee continue in possession, and the lessor be inactive and silent, *a complete mutual obligation for continuing the lease, is created by the act of occupancy of the tenant on the one side, and the inaction and silence of the lessor on the other.*" (Italics supplied.)

By citing the reconduction of a lease as the classic example of the tacit *creation* of a valid conventional obligation this article completely refutes the view that reconduction merely effects a "continuance" of the original lease by operation of law. Declaring that a "complete mutual obligation . . . is created by the act of occupancy on the one side, and the inaction and silence of the lessor on the other," this provision renders it impossible to escape the conclusion that the reconducted lease is the result of a new convention.²⁰

This criticism was heeded and the final draft of the French Civil Code (Art. 1776) refers to reconduction as creating a new lease.

16. The French text of this article as found in the Civil Code of 1808 (p. 375, Art. 14) is as follows: "*Si après l'expiration du bail d'un héritage rural, le fermier continue sa jouissance, sans qu'il y ait été fait aucune diligence de la part du bailleur ou d'un nouveau fermier pour le contraindre à sortir, le bail se prolonge aux prix, clauses et conditions prescrits par celui qui est expiré, mais pour l'année seulement qui suit immédiatement la dernière du bail qui est expiré.*"

17. Art. 17, La. Civil Code of 1870.

18. See decisions cited in note 10, *supra*.

19. La Civil Code of 1870. The position of this article in our Code is of more than ordinary significance. Placed under the title "Of Conventional Obligations" and under the section entitled "Of the Consent Necessary to Give Validity to a Contract," this article from its very situation affirms the fact that tacit reconduction is nothing more nor less than a *contract*, even though the *consent* thereto is predicated upon a presumption of law.

20. In complete conformity with this view is the provision of Article 2691 which declares that "When notice has been given, the tenant, although he

Moreover, it is difficult from a practical point of view to regard reconduction as merely continuing the original lease. In order for reconduction to operate, the lessee must have remained in possession *after* the expiration of the term for a *month* in the case of the rural lease²¹ and for a *week* in the case of the lease of urban property.²² During this period either party is at perfect liberty to frustrate the operation of the reconduction—the lessor, by instituting ejectment proceedings; and the lessee, by merely removing from the premises. Consequently, there can be no legal or conventional tie which binds the parties. Now, since a *continuation* necessarily connotes an *uninterrupted* extension or succession, this hiatus or period of abeyance completely negatives any idea that the eventual resumption of the terms and conditions of the lease is in the nature of a *continuance* thereof. The lease might be re-established with retroactive effect by the convention of the parties, but under no circumstances can it be continued.²³

Furthermore, the theory herein advanced is in complete harmony with the historical origin of the pertinent Louisiana codal articles and with the view entertained in other jurisdictions. The French law, from which our provisions were undoubtedly taken,²⁴

may have continued in possession, can not pretend that there has been a tacit renewal of the lease." Since the agreement is based upon a tacit consent legally presumed from the conduct of the parties, any action by one of them manifesting a contrary intention must necessarily destroy the operation of the reconduction. 4 Pothier, op. cit. supra note 3, at 119, n° 344. Also in substantiation of the position taken is Article 2690 which discharges the security given by the lessee from any obligation which might result under the reconducted lease. This latter provision may be justified only upon the theory that a new contract takes place.

21. Article 2688, La. Civil Code of 1870.

22. Article 2689, La. Civil Code of 1870.

23. This argument was advanced by Judge Odom, then sitting on the bench of the Second Circuit Court of Appeals, in the case of *Comegys v. Shreveport Kandy Kitchen*, 3 La. App. 692, 695 (1926). Although the decision of the court of appeals was reversed by the Supreme Court (see note 10, supra) Judge Odom's argument was not adequately refuted.

24. It appears that the redactors of the Louisiana Civil Code of 1808 relied more upon the French *Projet du Gouvernement* in drafting the articles on reconduction than upon the final draft of the Code Napoleon. Article 14 (p. 375) of Book III, Title VIII of the Code of 1808 (Art. 2688, La. Civil Code of 1870) dealing with reconduction of rural leases is essentially the same as Article 25 of Book III, Title XIII of the French *Projet*; whereas there was a substantial change in wording before this article was adopted as Article 1776 of the Code Napoleon. The succeeding article (Art. 2689, La. Civil Code of 1870) treating of reconduction of urban leases finds its counterpart both in Article 26 of the same section of the French *Projet* and in Article 1759 of the final French draft. However, the Code Napoleon contains another article (Art. 1738) on this subject which is found neither in the French *Projet* nor in the Louisiana Code of 1808. Article 16 of the same title of the Code of 1808 (Art. 2690, La. Civil Code of 1870) is literally the same as Article 27 of the same section of the French *Projet* and Article 1740 of the Code Napoleon. However, Art. 2691, La. Civil Code of 1870, is not to be found either in the

has always considered the reconducted lease as a new convention.²⁵ And the Roman law, which influenced the French in this regard,²⁶ was no less certain in adopting the same position.²⁷ Similarly, Spain,²⁸ and even the common law,²⁹ have concluded that such a situation results in the creation of a new contract.

In conclusion, therefore, it is submitted that, though mistranslations of our codal articles have created much confusion with regard to this subject, a proper analysis of the provisions of our code points inevitably to the conclusion that, regardless of any contrary decisions of our courts, Louisiana has adopted the traditional civil law view that reconduction operates to create a new, though tacit convention between the parties.

FELIX H. LAPEYRE*

Louisiana Civil Code of 1808 or the French *Projet*. It was first introduced into our law as Article 2861 of the Civil Code of 1825 and is taken verbatim from Article 1739 of the Code Napoleon.

25. Articles 1738 and 1776 of the Code Napoleon expressly declare that reconduction operates to create a new lease. 17 Duranton, op. cit. supra note 3, at 197, n° 216; Troplong, op. cit. supra note 3, at 5-6, n° 447; 10 Huc, op. cit. supra note 3, at 452, n° 334; 6 Marcadé, op. cit. supra note 5, at 533; 10 Planiol et Ripert, op. cit. supra note 5, at 794, n° 628; 20 Baudry-Lacantinerie, op. cit. supra note 3, at 809, n° 1401; 25 Laurent, op. cit. supra note 7, at 373, n° 334. But even prior to the enactment of these articles, the same view had obtained. 13 Merlin, op. cit. supra note 1, at 379, No. I; 2 Ferrière, Dictionnaire de Droit et de Pratique (1762) 1010; 7 Encyclopédie Méthodique (1787) 225; 4 Pothier, op. cit. supra note 3, at 119, n° 342.

26. 13 Merlin, op. cit. supra note 1, at 384, Nos. III-V; 4 Pothier, op. cit. supra note 3, at 119, n° 342; 1 Domat, Oeuvres (1828) 211, n. 3-5.

27. "*Qui ad certum tempus conducit, finito quoque tempore colonus est: intelligitur enim dominus cum patitur colonum in fundo esse, ex integro locare, et huiusmodi contractus neque verba, neque scripturam utique desiderant, sed nudo consensu convalescunt. Et ideo si interim dominus furere coeperit, vel decesserit, fieri non posse Marcellus ait, ut locatio redintegretur. Et est hoc verum.*" Corpus Juris Civilis, D. 19.2.14.

"When anyone rents land for a certain time, he remains a tenant even after it has expired; for it is understood that where an owner allows a tenant to remain on the land *he leases it to him again*. A contract of this kind does not require either words, or writing to establish it, but becomes valid by mere consent. Therefore, if the owner of the property should become insane or die in the meantime, Marcellus states that it cannot be held that the lease is renewed; and this is correct." 5 Scott, The Civil Law (1932) 82. (Italics supplied.) See Girard, Manuel Elémentaire de Droit Romain (6 ed. 1918) 583.

28. Las Siete Partidas, 5.8.20; 10 Manresa, Commentarios al Código Civil Español (4 ed. 1931) 542.

29. At common law, the term *reconduction* is unknown. However, a substantially similar theory is used when a tenant for a specified time *holds-over* at the expiration of the term. If the landlord does not eject the tenant, the latter becomes a *tenant at will* or a *tenant from year to year* according to the circumstances. In either case, a new agreement is implied. 2 Tiffany, A Treatise on the Law of Landlord and Tenant (1912) 1478, § 209(e); Kennedy v. City of New York, 196 N.Y. 19, 89 N.E. 360 (1909); Edward Hines Lumber Co. v. American Car & Foundry Co., 262 Fed. 757 (C.C.A. 7th, 1919); People's Trust Co. v. Oates, 68 F. (2d) 353 (C.C.A. 4th, 1934).

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Notes

AGENCY—SCOPE OF EMPLOYMENT—LIABILITY OF CORPORATION FOR TORT OF AGENT—A, salesman of the defendant insurance company, while engaged in soliciting insurance and collecting premiums, approached plaintiff, salesman of a rival company, who was in the act of writing an application for a former regular customer of A, and denounced plaintiff as a thief. Plaintiff brought an action against the defendant company and A, and the defendant's exception of no cause of action was maintained. On appeal, it was *held*, with two judges dissenting, that the case be remanded. An act of defamation within the scope of A's employment rendered A and the defendant company liable *in solido*. *Wisemore v. First Nat. Life Ins. Co., Inc.*, 190 La. 1011, 183 So. 247 (1938).

As a general rule, a corporation is liable, like a natural person, for the torts of its officers or agents within the scope¹ or apparent scope² of their authority—or, in the language of the Civil Code, "in the exercise of the functions in which they are employed."³ Louisiana courts have consistently held corporations responsible for defamations committed by their agents.⁴ Liability is imposed although a specific intent or malice is an element of the tort committed.⁵ Even though the act of an agent is performed in an unlawful or criminal manner, the corporation is liable, so long as the thing done forms a part of the agent's duties.⁶ Thus, a corporation may be held liable for a homicide committed by a watchman,⁷ or by a private policeman after an attempted arrest.⁸

1. *Ware v. Barataria and Lafourche Canal Co.*, 15 La. 169, 35 Am. Dec. 189 (1840); *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 3 So. 631, 8 Am. St. Rep. 512 (1888); *Cassidy v. Holliman & Spiers*, 13 La. App. 468, 126 So. 733 (1930).

2. See *Gann v. Great Southern Lumber Co.*, 131 La. 400, 404, 59 So. 830, 831 (1912).

3. Art. 2320, La. Civil Code of 1870. *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 3 So. 631, 8 Am. St. Rep. 512 (1888); *Matthews v. Otis Mfg. Co.*, 142 La. 88, 76 So. 249 (1917). But see Arts. 442-443, La. Civil Code of 1870.

4. *Benito Vinas v. Merchants' Mutual Insurance Company of New Orleans*, 27 La. Ann. 367 (1875); *Pattison v. Gulf Bag Co., Ltd.*, 116 La. 963, 41 So. 224 (1906); *Vicknair v. Daily States Pub. Co., Ltd.*, 153 La. 677, 96 So. 529 (1923).

5. See *Gann v. Great Southern Lumber Co.*, 131 La. 400, 404, 59 So. 830, 831 (1912).

6. *Nash v. Longville Lumber Co.*, 148 La. 943, 88 So. 226 (1921).

7. *Vincent v. Morgan's Louisiana & T. R. & S. S. Co.*, 140 La. 1027, 74 So. 541 (1917).

8. *Gann v. Great Southern Lumber Co.*, 131 La. 400, 59 So. 830 (1912).

To impose liability upon the corporation, the act of the agent must be within the scope of his employment and not merely in the course thereof.⁹ An assault by the lockkeeper employed to collect tolls upon a boatman who had failed to pay the toll,¹⁰ the act of a boat's mate in throwing a pine knot at a deckhand who was stealing whiskey,¹¹ an assault by a railroad porter upon a passenger,¹² murder by a railroad conductor,¹³ the act of a driver of a street car in having a passenger arrested,¹⁴ an assault upon a customer by a servant employed to deliver merchandise,¹⁵ and an attack by an express agent upon a customer against whom the agent held a grudge,¹⁶ have been held outside the scope of the agent's employment.

The bare allegation that an agent's acts are done within the scope of his employment is only a conclusion of the pleader.¹⁷ Consequently, the actual facts of a given case necessarily determine whether a tort, that has been committed in the course of a servant's employment, was within the scope of his employment or authority.¹⁸ To be within the scope of employment, the conduct giving rise to the defamation must be of the same general nature as that authorized, or incidental to it.¹⁹ The only question is whether the wrongful act was merely an excessive manner of performing a duty within the scope of the employment so as to be entirely beyond contemplation on the part of the employer.²⁰ A helpful test in determining liability is: *In whose behalf* was the

9. *Godchaux v. Texas & P. Ry. Co.*, 144 La. 1041, 81 So. 706 (1919); *Comfort v. Monteleone*, 163 So. 670 (La. App. 1935).

10. *Ware v. Barataria & Lafourche Canal Co.*, 15 La. 169, 35 Am. Dec. 189 (1840).

11. *Peter Dyer v. Peter Rieley & Thomas P. Leathers*, 28 La. Ann. 6 (1876).

12. *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 3 So. 631, 8 Am. St. Rep. 512 (1888).

13. *Daniel Candiff v. Louisville, New Orleans & Texas Railway Company*, 42 La. Ann. 477, 7 So. 601 (1890).

14. *Louis Lafitte v. New Orleans City & Lake Railroad Company*, 43 La. Ann. 34, 8 So. 701, 12 L.R.A. 337 (1891).

15. *McDermott v. American Brewing Co.*, 105 La. 124, 29 So. 498, 52 L.R.A. 684, 83 Am. St. Rep. 225 (1901). Cf. *Matthews v. Otis Mfg. Co.*, 142 La. 88, 76 So. 249 (1917).

16. *Godchaux v. Texas & P. Ry. Co.*, 144 La. 1041, 81 So. 706 (1919).

17. *Hale v. Gilliland Oil Co.*, 151 La. 500, 91 So. 853 (1922). See *Valley v. Clay*, 151 La. 710, 713, 92 So. 308, 309 (1922).

18. See *Godchaux v. Texas & P. Ry. Co.*, 144 La. 1041, 1044, 81 So. 706, 707 (1919).

19. 1 Restatement, Agency (1933) § 229.

20. See *Godchaux v. Texas & P. Ry. Co.*, 144 La. 1041, 1045, 81 So. 706, 707 (1919).

employee acting, and was it with the intention of serving the purposes of the employer.²¹

In the instant case, the court practically disregarded the requirement that, in order to impose liability upon a corporation, the act of its agent must be within the scope of employment as well as in the course thereof. As was said in *Comfort v. Monteleone*:²² "If an employee whose duties are limited to peaceful functions undertakes to perform others of a different character . . . the master is not responsible. . . ." The defendant company in the principal case could not have contemplated that their salesman would so far depart from his peaceful duties as to slander the salesman of a rival company. Undoubtedly, the company did not intend to authorize its agent to defame. Liability should not be imposed for abnormal acts of the agent or for an act committed by the agent with no intention to perform it as a part of, or incident to, a service on account of which he was employed.²³

F. H. O'N.

CONFLICT OF LAWS—JURISDICTION UNDER NON-RESIDENT MOTORIST STATUTE DOES NOT EXTEND TO AGENT—A non-resident corporation was sued for an injury caused by the negligent operation of its automobile by its agent. Substituted service was made upon the Secretary of State of Illinois under a statute¹ which provided that the operation by a non-resident of a motor vehicle within the state shall be deemed an appointment of the Secretary of State as attorney for the service of process. *Held*, that the statute should be construed strictly, confining its operation to cases in which the vehicle is personally operated by its non-resident owner, and that operation by an agent of the non-resident corporation is not such "personal" operation. *Jones v. Pebler*, 16 N.E. (2d) 438 (Ill. App. 1938).

21. See *McDermott v. American Brewing Co.*, 105 La. 124, 126, 29 So. 498 (1901).

22. *Comfort v. Monteleone*, 163 So. 670, 672 (La. App. 1935).

23. 1 Restatement, Agency (1933) § 235. In *Comfort v. Monteleone* the court said: "An employee is never vested with authority to exercise force in the venting of personal animosity." (163 So. at 673). See 13 A. L. R. 1142 (1921) (Liability of insurance company for libel or slander by its agents or employees); and Comment (1936) 20 Minn. L. Rev. 805 (discussion of existing jurisprudence regarding a master's liability for defamation published by servant, and a suggested solution of certain problems).

1. Ill. Rev. Stats., c. 95½, § 23.

Although non-resident motorist statutes have frequently been subjected to litigation wherein violation of the due process clause² and the privileges and immunities clause³ of the Federal Constitution is alleged, the courts have unanimously held such statutes constitutional.⁴ The basis of jurisdiction over non-resident motorists lies in implied consent;⁵ the explanation of their constitutionality is founded upon the theory that to require the non-resident motorist to "consent" to service upon a statutory agent is a reasonable exercise of the police power of the state whose highways the non-resident motorist uses.⁶ It should be remembered that the statutes must contain provisions for notification reasonably calculated to inform the defendant of the pending action,⁷ otherwise the judgment obtained thereunder would be a nullity, as a denial of "due process of law."⁸

Courts have been practically uniform in their unwillingness to construe non-resident motorist statutes liberally.⁹ In spite of the well-known doctrine that the act of the agent within the scope of his authority is the act of the principal, the rule of the instant case that the words "operation by a non-resident" refer only to personal operation of the motor vehicle by the non-resident owner is

2. U.S. Const. Amend. XIV.

3. U.S. Const. Art. IV, § 2.

4. *Kane v. New Jersey*, 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222 (1916); *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927); *Hartley v. Vitiello*, 113 Conn. 74, 154 Atl. 255 (1931); *Schilling v. Odlebak*, 177 Minn. 90, 224 N.W. 694 (1929); *Ashley v. Brown*, 198 N.C. 369, 151 S.E. 725 (1930); *State v. Belden*, 193 Wis. 145, 211 N.W. 916, 57 A.L.R. 1218 (1927). See *Stumberg*, *Conflict of Laws* (1937) 92-95.

5. 1 Beale, *Conflict of Laws* (1935) 359, § 84.2; *Restatement, Conflict of Laws* (1934) §§ 81-94. See *Doherty v. Goodman*, 294 U.S. 623, 55 S.Ct. 553, 79 L.Ed. 1097 (1933), discussed in *Goodrich*, *Conflict of Laws Since the Restatement* (1937) 23 A.B.A.J. 119.

6. *Kane v. New Jersey*, 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222 (1916); *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927); *Galloway v. Wyatt Metal & Boiler Works*, 189 La. 837, 181 So. 187 (1938); *Spearman v. Stover*, 170 So. 259 (La. App. 1936); *Schilling v. Odlebak*, 177 Minn. 90, 224 N.W. 694 (1929).

7. *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927).

8. *Wuchter v. Pizzutti*, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446, 57 A.L.R. 1230 (1928); *Spearman v. Stover*, 170 So. 259 (La. App. 1936); *Restatement, Conflict of Laws* (1934) § 75 and *Restatement, Conflict of Laws, Louisiana Annotations* (1937) § 75. Cf. *Charry v. Heffernan*, 182 So. 427 (Fla. 1938).

9. *Day v. Bush*, 18 La. App. 682, 139 So. 42 (1932); *Schilling v. Odlebak*, 177 Minn. 90, 224 N.W. 694 (1929); *O'Tier v. Sell*, 252 N.Y. 400, 169 N.E. 624 (1930). *Contra*: *Salzman v. Attrean*, 142 Misc. 245, 254 N.Y. Supp. 288, 290 (Munic. Ct. 1931): "This law is one of general scope, being directed to a matter of procedure, and, being remedial in character, is to be liberally, rather than rigidly, construed." See also, *Young v. Masci*, 289 U.S. 253, 53 S.Ct. 599, 77 L.Ed. 1158 (1933), where the non-resident lender of an automobile was held liable, although, by the law of the state in which the loan was made, he would have been exempt from liability for the borrower's negligence.

well supported by authority.¹⁰ It is, nevertheless, submitted that such a strict construction is unfortunate in that it disregards the true intent of the law-makers and the public policy which prompted these enactments. A liberal construction of such statutes should particularly be applied where the non-resident owner is a corporation, because a corporation can act only through its agents and servants.¹¹ To hold that the non-resident owner must personally operate the motor vehicle clothes the corporation with judicial immunity from substituted service under the non-resident motorist statutes. Any but a liberal construction defeats the purpose for which such statutes are enacted—for the same reasons of public policy exist in the case of a corporation as that of any other non-resident owner.¹²

The Louisiana non-resident motorist act,¹³ prior to its amendment in 1932,¹⁴ was much broader in scope than the Illinois Act¹⁵ in the principal case, in that the Louisiana statute includes a "non-resident or his authorized chauffeur." Nevertheless, the same strict construction has been applied to it, and the word "chauffeur" was held to be used in a narrow sense and to have no application to an agent operating his employer's automobile within the scope of his employment.¹⁶ In the following session of the legislature the word "chauffeur" was changed to "employee,"¹⁷ and the Supreme Court immediately leaned toward the much needed liberal construction.¹⁸

10. *Morrow v. Asher*, 55 F. (2d) 365 (N.D. Tex. 1932); *Brown v. Cleveland Tractor Company*, 265 Mich. 475, 251 N.W. 557 (1933); *Flynn v. Kramer*, 271 Mich. 500, 261 N.W. 77 (1935); *O'Tier v. Sell*, 252 N.Y. 400, 169 N.E. 624 (1930). See in particular *Jones v. Newman*, 135 Misc. 473, 239 N.Y. Supp. 265 (1930).

11. *Poti v. N.E. Road Mach. Co.*, 83 N.H. 232, 140 Atl. 587 (1928); *Bessan v. Public Service Co-ordinated Transport*, 135 Misc. 368, 237 N.Y. Supp. 689 (1929); *Bischoff v. Schnepf*, 139 Misc. 293, 249 N.Y. Supp. 49 (1930).

12. See cases cited in note 6, *supra*.

13. La. Act 86 of 1928.

14. La. Act 184 of 1932 [Dart's Stats. (1932) §§ 5296-5298].

15. Ill. Rev. Stats., c. 95½, § 23, cited in note 1, *supra*.

16. *Day v. Bush*, 18 La. App. 682, 139 So. 42 (1932).

17. La. Act 86 of 1928, as amended by La. Act. 184 of 1932 [Dart's Stats. (1932) §§ 5296-5298]; in *Braslett v. United States Fidelity & Guaranty Co.*, 153 So. 471 (La. App. 1934), it was held that the word "employee" did not cover a gratuitous bailee.

18. In *Galloway v. Wyatt Metal & Boiler Works*, 189 La. 837, 181 So. 187 (1938), it was held that the term "public highways" as employed in the 1928 act, as amended, is broad enough to include every way for travel by persons on foot or with vehicles which the public has the right to use: "Courts are not required to construe, and will not construe, a statute so as to defeat its purpose or to produce a result that is not within the legislative intent. On the contrary, the courts will construe a statute so as to accomplish the purpose for which it was enacted and to give effect to the legislative will." (189 La. at 845, 181 So. at 189).

Although incorporated under the laws of another state, a non-resident corporation, that has complied with all the statutory requirements relative to doing business in Louisiana and has appointed an agent upon whom service of process may be made,¹⁹ becomes a "domestic" corporation as contradistinguished from a "foreign" corporation.²⁰ Therefore, such a corporation would not be a "non-resident" within the intendment of the 1928 act (as amended) and service of process would be made upon the agent appointed by the corporation, or upon the Secretary of State (if the agent so appointed should have removed from the state, or died).²¹

In order to avoid strict constructions by the courts, other states have amended their original laws and have extended the application of the statute to others than operators.²² It is unfortunate that, in their present attitude, the courts persist in interpreting non-resident motorist statutes so narrowly as to defeat the legislature's evident intent to make all who use the roads of the state, whether residents or non-residents, amenable to suit within the state for injuries occasioned within its borders. The argument that non-resident motorist statutes are in derogation of common law²³ or of "common right"²⁴ is merely a judicial device the result of which is to hamper effective regulation by the state of a universally recognized evil. It is submitted that, with the constitutional safeguards adequately provided for, there is no longer any reason why statutes providing for substituted service of process should not be liberally construed. If they are not, we shall continually witness the unfortunate spectacle of the legislature being forced to correct one narrow decision after another.

J. B.

19. La. Act 267 of 1914, § 23, as amended by La. Act 120 of 1920, § 1 [Dart's Stats. (1932) § 1246].

20. *Burgin Bros. & McCane v. Barker Baking Co.*, 152 La. 1075, 95 So. 227 (1922).

21. La. Act 184 of 1924, § 3 [Dart's Stats. (1932) § 1252]. Cf. *State v. American Ry. Express Co.*, 159 La. 1001, 106 So. 544 (1924); *State v. Southern Bell Telephone & Telegraph Co.*, 171 La. 1088, 133 So. 166 (1931).

22. La. Act 86 of 1928, as amended by La. Act 184 of 1932 [Dart's Stats. (1932) §§ 5296-5298] (operation by a non-resident or his authorized employee); *Minn. Acts* (1933), c. 351, § 4 (any operator other than the owner, with the express or implied consent of the owner shall in case of accident, be deemed the agent of the owner); *Tenn. Code* (Williams 1934) § 8671 (any owner, chauffeur or operator).

23. *Morrow v. Asher*, 55 F. (2d) 365, 367 (D.C.N.D.Tex. 1932).

24. *Day v. Bush*, 18 La. App. 682, 684, 139 So. 42, 44 (1932); *Spearman v. Stover*, 170 So. 259, 262 (La. App. 1936). "Derogation of common right" is nothing more than a maxim which is an expansion of the "derogation of common law" doctrine at common law and has no place in Louisiana jurisprudence. "Derogation of common law" is fundamentally common law and arose

CONSTITUTIONAL LAW—POLICE POWER—ORDINANCE MAKING HOUSE TO HOUSE CANVASSING A NUISANCE—A municipal ordinance¹ declared the practice of going in and upon private residences without an invitation, by solicitors, peddlers, hawkers or itinerant merchants and transients, and vendors of merchandise to be a nuisance and punishable as a misdemeanor. Section 4 of the ordinance contained the following exception: "Provisions of this ordinance shall not apply to the vending or sale of ice, or soliciting orders for the sale of ice and milk, and dairy products, truck vegetables, poultry and eggs and other farm and garden produce so far as the sale of the named commodities is now authorized by law." Defendant was convicted of having violated the ordinance. *Held*, that the ordinance was a proper exercise of police power, in that it tended to prevent fraud, deceit, cheating and imposition, and the consequences thereof. *City of Shreveport v. Cunningham*, 190 La. 481, 182 So. 649 (1938).

The instant case is in accord with the majority rule as enunciated in *Town of Green River v. Fuller Brush Company*.² It must be borne in mind that such an ordinance does not denounce peddling, but is aimed at the annoyance caused to householders by uninvited solicitors and peddlers.³ It is directed not at the sale of goods, but at the manner of their sale.⁴ Since the evil contemplated by the ordinance is the annoyance caused by peddling and not the act of peddling, such an ordinance applies to solicitors of wares for future delivery.⁵

Presumably the solicitation of out of state orders is within the purview of the Louisiana ordinance. This is not unconstitutional as a regulation of interstate commerce but has a mere incidental effect on such commerce. It is primarily a matter for local

as a result of the jealousy which the judiciary entertained toward legislation. It is unfortunate that such a doctrine has crept into Louisiana for the reason that in civil law states all rights emanate from the legislature.

1. Ordinance No. 50 of 1937 of the City of Shreveport.

2. 65 F. (2d) 112, 88 A.L.R. 177 (C.C.A. 10th, 1933) noted (1934) 18 Minn. L. Rev. 475.

3. *Ibid.* *Town of Green River v. Bunger*, 50 Wyo. 52, 58 P. (2d) 456, 458 (1936). The Wyoming Court said: "The ordinance in question is intended to suppress acts having a tendency to annoy, disturb, and inconvenience people in their homes."

4. *Wardens License*, 24 Pa. Super. Ct. 75 (1903). See also: *New Orleans v. Fargot*, 116 La. 369, 40 So. 735 (1906) (peddlers and hawkers prohibited from crying their goods in a loud and boisterous manner in the city streets) and *St. Martinville v. Eugas*, 158 La. 262, 103 So. 761 (1925) (exposure of meat for sale limited to public market place).

5. *Town of Green River v. Fuller Brush Co.*, 65 F. (2d) 112, 88 A.L.R. 117 (C.C.A. 10th, 1933), noted in (1934) 18 Minn. L. Rev. 475. *Town of Green River v. Bunger*, 50 Wyo. 52, 58 P. (2d) 456 (1936).

control.⁶ An imposition of a heavy license tax on peddling has been held valid⁷ but a discriminatory tax placed on the solicitation of out of state goods is an interference with interstate commerce.⁸

Several cities have passed ordinances similar to the one under discussion. In considering such an ordinance recently, the Supreme Court of Florida⁹ reached a conclusion contrary to that of the instant case, holding the ordinance to be an unreasonable exercise of the police power in violation of constitutional rights. Other state courts have reached this same result.¹⁰ These decisions seem indistinguishable from the instant case on constitutional grounds. They might have been differentiated in that, in the Louisiana case, there was clear cut statutory authority for the enactment of the ordinance in question,¹¹ whereas the cases holding to the contrary show a lack of such statutory authority.¹² The decisions, however, do not appear to be grounded on this point.

6. *Town of Green River v. Fuller Brush Co.*, 65 F. (2d) 112, 88 A.L.R. 117 (C.C.A. 10th, 1933) noted (1934) 18 Minn. L. Rev. 475. *Town of Green River v. Bunker*, 50 Wyo. 52, 58 P. (2d) 456 (1936) (An ordinance similar to the one in the main case was attacked as being unconstitutional. The Supreme Court of Wyoming held it to be valid. An appeal to the United States Supreme Court was dismissed for want of a substantial federal question. 300 U.S. 638, 57 S.Ct. 510, 81 L.Ed. 854 (1937). Rehearing denied 300 U.S. 688, 57 S.Ct. 752, 81 L.Ed. 889 (1937). In dismissing this case, the Supreme Court cited as authority *Williams v. State*, 85 Ark. 464, 108 S.W. 838 (1908), *aff'd*, 217 U.S. 79, 30 S.Ct. 493, 54 L.Ed. 673, 18 Ann. Cas. 865 (1910) (statute prohibiting soliciting on trains).

7. *City of Duluth v. Kemp*, 46 Minn. 435, 49 N.W. 235 (1891).

8. *Welton v. Missouri*, 91 U.S. 275, 23 L.Ed. 347 (1876) (Missouri statute requiring a license tax from persons selling out of state produce or merchandise held invalid under the commerce clause); *Robbins v. Shelby Taxing District*, 120 U.S. 489, 7 S.Ct. 592, 30 L.Ed. 679 (1887). *Brennan v. City of Titusville*, 153 U.S. 289, 14 S.Ct. 829, 38 L.Ed. 718 (1894).

9. *Prior v. White*, 180 So. 347 (Fla. 1938) noted (1938) 23 Minn. L. Rev. 88.

10. *City of Orangeburg v. Farmer*, 181 S.C. 143, 186 S. E. 783 (1936) (Ordinance of Orangeburg, S.C., held to be unreasonable because based upon the act and not the conduct of the salesman); *Jewell Tea Co. v. Town of Bel Air*, 172 Md. 536, 192 Atl. 417 (1937).

11. The charter of the City of Shreveport, La., Act 74 of 1934, § 2, declares: "That the City of Shreveport shall have, and is hereby given the following powers, to-wit: . . . (7) . . . to regulate (or suppress) . . . peddlers . . ."

12. *Prior v. White*, 180 So. 347 (Fla. 1938) noted (1938) 23 Minn. L. Rev. 88; *City of Orangeburg v. Farmer*, 181 S.C. 143, 186 S.E. 783 (1936); *Jewell Tea Co. v. Town of Bel Air*, 172 Md. 536, 192 Atl. 417 (1937). An activity may be declared a nuisance only when it is such by common law or by statutory definition, *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105 (1883). A nuisance in fact may be declared by the municipality, *McQuillin, Municipal Ordinances* (1904) § 441, p. 687, n.79; *S. H. Kress and Co. v. City of Miami*, 78 Fla. 101, 82 So. 775 (1919). Express statutory authority is necessary to permit regulation of an activity which is not a nuisance *per se*, *Jewell Tea Co. v. Town of Bel Air*, 172 Md. 536, 192 Atl. 417 (1937); *Yates v. The City of Milwaukee*, 77 U.S. 497, 19 L.Ed. 984 (1870).

Although the Louisiana ordinance under discussion is similar to those in the contrary cases, it is of much broader scope. It goes further and "classifies" solicitors and peddlers by excepting those who sell certain types of produce: namely, ice, vegetables, butter, eggs, dairy products, and other farm produce. This classification was held not to be class legislation and therefore not discriminatory. The Court reasoned that wide discretion must be conceded to the legislative power in the classification of trades, callings, businesses or occupations, and that "legislation which affects alike all persons pursuing the same business under the same conditions is not such class legislation as is prohibited by the United States or the State Constitution." If, however, the manner of solicitation or sale is the criterion of classification, it is hard to see how the activity of vendors of farm produce can be differentiated from that of vendors of other products not excepted from the application of the ordinance. On the other hand, if the classification emphasizes the possibility of annoyance and deceit, the distinction is perhaps well founded. It may be that the court felt that deceit does not characterize peddling of farm produce and that, in view of the difficulty which city-dwellers have in obtaining fresh country products, house-to-house peddling of this class of goods may well be considered a convenience rather than an annoyance.

R. K.

EMANCIPATION BY MARRIAGE—IS CONSENT OF PARENTS OR TUTOR NECESSARY FOR A MINOR OF EIGHTEEN?—In the succession proceedings of Mrs. Hecker, her surviving husband was appointed tutor of the minor children. In lieu of the legal mortgage a special mortgage in favor of the minors had been placed on two lots of ground and, when the tutor desired to sell one of them, he obtained permission of the court to substitute a United States Bond for the special mortgage on that lot. The recorder of mortgages nevertheless refused to cancel the mortgage on the ground that since the minor (eighteen years of age) had been fully emancipated by marriage the court could not authorize the substitution of a bond. The minor asked for the cancellation of the mortgage but the father and tutor contended that there was no emancipation by a marriage without his consent. *Held*, that under Article 382 of the Louisiana Civil Code of 1870, as amended by Act 224 of

1908, a minor eighteen years of age is emancipated by marriage regardless of the parent's or tutor's consent. *Succession of Hecker*, 185 So. 32 (La. 1938).

At an early date the Supreme Court of Louisiana held that where a minor marries without the necessary consent he is not emancipated and that Article 379 of the Civil Code refers to marriages authorized by our laws, not those in contravention of them.¹ Without this restriction, irresponsible and improvident minors could disregard their parents' wishes and enter into hurried marriages in order to circumvent parental authority and gain control of their estates.² This rule was then followed and approved in a number of cases.³ In 1902, in the well-considered case of *Guillebert v. Grenier*,⁴ the rule was reasserted and broadly stated. In the preceding cases, the marriages had been solemnized in other states and the decisions were based upon the theory that such marriages, contracted in evasion of our laws, were contrary to public policy. However, in the *Guillebert* case, the court stated by way of dictum that, even if the marriage had been contracted in this state, the disability regarding emancipation would be the same.⁵

Since Article 382 was amended by Act 224 of 1908, so as to give the eighteen year old minor emancipated by marriage the full rights of majority,⁶ there have been no cases before the Supreme Court in which the necessity of parental consent has been squarely involved. On a related problem, it has been held that the 1908 act fixed a personal status and did not have a retroactive effect but that, since it was a remedial statute, it took people in the condition in which it found them so that a married person who had previously reached the age of eighteen was emancipated only upon the promulgation of the act.⁷ Again, since the new article was identical with the language of a judicial decree of emancipation, it was held that prescription ran from the day of the

1. *Maillefer v. Saillot*, 4 La. Ann. 375 (1849).

2. *Guillebert v. Grenier*, 107 La. 614, 617, 32 So. 238, 239 (1902).

3. *Babin v. Leblanc*, 12 La. Ann. 367 (1857); *Clement v. Wafer*, 12 La. Ann. 599 (1857). Cf. *Boyd v. Frantom*, 14 La. Ann. 691 (1859), where the evidence did not show affirmatively that the marriage was without the consent of the tutor.

4. 107 La. 614, 32 So. 238 (1902).

5. 107 La. at 617, 32 So. at 239.

6. *Succession of Bonnette*, 188 La. 297, 176 So. 397 (1937); *Roe v. Caldwell*, 145 La. 854, 83 So. 43 (1919); *Eureka Homestead Society v. Sladovich*, 161 La. 265, 108 So. 478 (1926); *Arrington v. Gray*, 161 La. 413, 108 So. 790 (1926). See *Bostwick v. Thomson*, 149 La. 152, 157, 88 So. 775, 776 (1921); *Roy v. Mutual Rice Co.*, 177 La. 883, 891-892, 149 So. 508, 511 (1933).

7. *Bostwick v. Thomson*, 149 La. 152, 88 So. 775 (1921).

marriage.⁸ Of course, any minor emancipated by marriage is entitled to sue in his own name.⁹ The closest approach to the issue of the principal case is found in a dictum that a minor would be emancipated by a marriage without parental consent since disinheritance is the only penalty for this disobedience.¹⁰

In the present case, the decision relies heavily upon the interpretation of Article 382 given in *Arrington v. Gray*¹¹ that, by the 1908 amendment, the legislature intended all married minors eighteen years of age to be fully emancipated without qualification.¹² However, the *Arrington* case did not raise the question of a minor's marriage without parental consent. Neither was this question considered in the cases of *Roe v. Caldwell*¹³ and *Bostwick v. Thomson*¹⁴ which were also cited as authority. It is therefore questionable whether the present decision can be justified on the reasoning of these cases, or cases prior to 1908.¹⁵ Perhaps it would have been more logical for the court to have adopted the reasoning of the dissent in *Guillebert v. Grenier* that, since Article 97 (requiring parental consent to minor's marriage) is modified by Article 112 (sustaining the validity of such marriage but making it a cause for disinheritance), the minor is emancipated of right by the marriage.¹⁶

In France, there is no room for such diversity of opinion because the requirement of parental consent is accompanied by the right of the person whose necessary consent was not obtained to have the marriage annulled.¹⁷ Emancipation by marriage takes place by operation of law regardless of absence of consent to the marriage or to the emancipation, but in the event of annulment the marriage is deemed never to have existed and the emancipa-

8. *Arrington v. Gray*, 161 La. 413, 108 So. 790 (1926).

9. Art. 380, La. Civil Code of 1870; *Bonnette v. Flournoy*, 9 La. App. 467, 119 So. 736 (1929).

10. *State v. Sacred Heart Orphan Asylum*, 154 La. 883, 889, 98 So. 406, 408 (1923).

11. 161 La. 413, 108 So. 790 (1926), cited in note 8, supra.

12. According to the court of appeals in the decision of the principal case, the purpose of the amendment was not to overrule the doctrine of the *Guillebert* case, but was merely to grant greater powers to emancipated married minors. 180 So. 228 (La. App. 1938).

13. 145 La. 854, 83 So. 43 (1919).

14. 149 La. 152, 88 So. 775 (1921), cited supra note 7.

15. These were concerned only with the power of administration; the question of consent was not involved. *Wither's Heirs v. His Executors*, 3 La. 363 (1832); *Grigsby et al v. Louisiana Bank*, 3 La. 491 (1832); *Briscoe v. Tarkington*, 5 La. Ann. 692 (1850); *Patterson & Co. v. Frazer*, 8 La. Ann. 512 (1852); *Succession of Mitchell*, 33 La. Ann. 353 (1881).

16. *Nicholls, C.J.*, in 32 So. 238, 239 (1902).

17. Arts. 148, 182, French Civil Code.

tion likewise falls.¹⁸ Thus, emancipation by marriage in France is in effect dependent upon parental consent.

In Louisiana, since parental consent is essential for judicial emancipation, it should also be necessary for emancipation by marriage. The prior Louisiana jurisprudence—which is disregarded by the present decision—is more in harmony with other provisions of the Civil Code, particularly those regarding judicial emancipation. If the refusal of a selfish parent or tutor to consent to the minor's marriage could be considered as "ill-treatment" within the intendment of Article 387, it would be possible to obtain a judicial emancipation. In view of the fact that the present decision was based on the 1908 amendment of Article 382 which refers only to minors who have reached the age of eighteen, it is open to question whether the court meant to leave the rule that, under similar circumstances, a minor under eighteen would not be emancipated.

J. G. C.

EVIDENCE—ADMISSIBILITY OF PAROL TO PROVE A CONTEMPORANEOUS COLLATERAL AGREEMENT—In answer to a suit for the balance due on a written contract of sale of roofing material, defendant contended that the plaintiff orally agreed to supervise the application of the roofing and to guarantee the roof for ten years. The defendant reconvened for damages resulting from faulty application of the roofing. *Held*, that parol evidence may be introduced by defendant to prove such an oral agreement, since it does not contradict the writing and would be in the nature of a contemporaneous collateral agreement to do something in addition to the obligation embodied in the written contract; but that defendant did not discharge her burden of proving the existence of the oral agreement. *Brandin Slate Co., Inc. v. Fornea*, 183 So. 572 (La. App. 1938).

The rule precluding admission of parol evidence to add to, subtract from, contradict or vary the terms of a valid written in-

18. 1 Planiol et Ripert, *Traité Pratique de Droit Civil Français* (1925) 653-654, n° 618; 2 Marcadé, *Explication Théorique et Pratique du Code Napoléon* (5 ed. 1852) 267, n° 476; 5 Laurent, *Principes de Droit Civil Français* (2 ed. 1876) 216-217, n° 195; 3b1s Beudant, *Cours de Droit Civil Français* (2 ed. 1936) 301, n° 1716; 1 Aubry et Rau, *Cours de Droit Civil Français* (5 ed. 1897) 831-832, § 129; 3 Huc, *Commentaire Théorique et Pratique du Code Civil* (1892) 448, n° 466. See Art. 476, French Civil Code.

strument is found in both civil¹ and common law.² Although Article 2276³ would seem to extend the prohibition to apply to agreements made subsequent to the written contract, it has long been held that the rule in this state is substantially the same as that at common law.⁴ Thus in the recent case of *Salley v. Louviere*⁵ the Supreme Court said that "The words 'or since' [in Article 2276] have reference to the phrase 'what may have been said,' and not to what may have been agreed to, since the making of the written contract," so "the meaning is that parol evidence as to what the parties to a written contract may have said at any time shall not be admitted for the purpose of proving that they had an antecedent or a contemporaneous agreement contrary to that which was reduced to writing."⁶

That parol may be introduced to prove an independent collateral agreement is a well recognized exception to the general rule.⁷ The question presented in the principal case is whether the bond between the two alleged agreements is sufficiently close to prevent proof of the oral agreement.⁸ "The test to determine whether the alleged parol agreement comes within the field embraced by the written one is to compare the two and determine 'whether parties, situated as were the ones to the contract, would naturally and normally include the one in the other if it were made.'"⁹ Although the general rule is everywhere cited in almost identical terms, it is inconsistently applied to various sets of facts.¹⁰

In Louisiana parol has been held inadmissible to show that the plaintiff had agreed to give a newspaper advertiser certain

1. See *Corbett v. Costello*, 8 La. Ann. 427, 428 (1853).

2. 1 Greenleaf, *Law of Evidence* (15 ed. 1892) 372, § 275.

3. Art. 2276, La. Civil Code of 1870: "Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, *or since*." (Italics supplied.)

4. *Moore v. Hampton*, 3 La. Ann. 192 (1848); *Jamison v. Ludlow*, 3 La. Ann. 492 (1848).

5. 183 La. 92, 162 So. 811 (1935).

6. 183 La. at 98, 162 So. at 813.

7. 5 Wigmore, *Evidence* (2 ed. 1923) 306, § 2430.

8. 3 Williston, *Contracts* (1936) 1832, § 637. *Mitchill v. Lath*, 247 N.Y. 377, 160 N.E. 646, 68 A.L.R. 239 (1928).

9. *Wagner v. Marcus*, 288 Pa. 579, 136 Atl. 847, 848 (1927). Cf. 3 Williston, *Contracts* (1936) 1833, § 638.

10. Wigmore, *Evidence* (2 ed. 1923) 306, § 2430. The Supreme Court of Louisiana, in referring to Articles 2236 and 2276 in *Robinson v. Britton*, 137 La. 863, 865, 69 So. 282, 283 (1915), quoted from the court of appeal decision of the same case: "These articles, and especially the latter, have been the subject of a vast number of decisions by our Supreme Court, and some of them are quite difficult to reconcile with the plain provisions and obvious purposes of the Code."

"write ups" in addition to the space bought;¹¹ or to show that a vendee by authentic act of sale had agreed to share equally with the vendor any profits from resale of the real estate purchased;¹² or that the vendor of phonographs had agreed verbally to have the merchandise delivered at least two weeks before Christmas, and to send a salesman to Louisiana to assist in demonstrating and selling the instruments.¹³ Parol has been admitted, however, to show that the lessor of certain property gave verbal notice to the lessee that no liquor could be sold on the premises, though the restriction was not included in the written instrument;¹⁴ and the vendee of a second hand car was permitted to show that the consideration named for the car included a sum for which the vendor agreed verbally to secure collision insurance for the purchaser.¹⁵

In accordance with the weight of Louisiana authority and under an application of the accepted criterion, it would seem that the parties in the instant case "naturally and normally" would have included the alleged collateral agreement—an important guaranty—in the written contract; thus the parol proof should have been barred. No harm was done in the principal case, since the evidence offered did not prove the existence of the purported oral agreement, yet this decision should not be taken as a precedent for further relaxation of the rule protecting the integrity of written contracts.

C. O'Q.

SEPARATION FROM BED AND BOARD—"MUTUAL WRONGS" DOCTRINE—A wife sued for separation from bed and board on the grounds of slander, defamation and cruel treatment. In denying these allegations, the husband averred—without making any reconventional demand—that his wife had an ungovernable temper and that, as a result of her cruelty to him, they had been living separate and apart for more than two years. On original hearing the plaintiff was awarded a decree of separation from bed and

11. *The Item Company, Ltd., v. Wormington Machinery Power & Equipment Co., Inc.*, 4 La. App. 519 (1926).

12. *Pfeiffer v. Nienaber*, 143 La. 601, 78 So. 977 (1918) (O'Niell, J., dissenting).

13. *Brenard Mfg. Co. v. M. Levy, Inc.*, 161 La. 496, 109 So. 43 (1926).

14. *New Orleans and Carrollton Railroad Company v. Darms*, 39 La. Ann. 766, 2 So. 230 (1887).

15. *McConnell v. Harris Chevrolet Co., Inc.*, 147 So. 827 (La. App. 1933).

board. *Held*, on rehearing, with two justices dissenting, that since both parties were at fault, and since the complainant was not comparatively free from wrong, no judgment could be granted in her favor. *Aragon v. Herrmann*, La. Sup. Ct., Docket No. 34,577 (1938).

At an early date,¹ the rule seems to have been settled that the provisions for separation from bed and board in certain cases are made for the relief of the oppressed party, not for the purpose of interfering in quarrels where both parties commit reciprocal excesses and outrages. This original doctrine of mutual wrongs was reasserted² and then qualified to the effect that the wrongs should be similar in nature and so proportional in extent as to render it difficult to ascertain which party is mainly at fault. This reduced the instances of application of the broad doctrine that reciprocal wrongs are mutually defeasible.³

From the language of a later case, *Schlater v. LeBlanc*,⁴ it would seem that the welfare of the children is a prime factor for consideration. In that case, a separation was granted despite the fact that both parties were at fault since this appeared to be in the interest of the children. On the other hand, where the facts supported the belief that, because of children, there remained some endearing ties which would make it possible for the spouses to live together companionably, then the court properly applied the doctrine of mutual wrongs in order to keep open an opportunity of reconciliation.⁵ In those instances where children are not involved and both parties are guilty of equal wrongs of a serious nature toward the other, then neither party will be granted relief in Louisiana, as the court adheres strictly to the original rule.⁶

1. *Durand v. Her Husband*, 4 Mart. (O.S.) 174 (La. 1816).

2. *Trowbridge v. Carlin*, 12 La. Ann. 882, 884 (1857).

3. *Thomas v. Tailleu*, 13 La. Ann. 127 (1858).

4. 121 La. 919, 930; 46 So. 921, 924 (1908). In this case the court stated as follows: "All during the time . . . there were disagreements, gloom, unhappiness in the family. There was suffering on the part of each, as we infer, which would not down. There was incompatibility between the two, difference in their natures." The court took cognizance of the incompatibility, the chance for future happiness, the welfare of the family as a whole.

5. *Castanéo v. Fortier*, 34 La. Ann. 135, 136 (1882). Where the parties had been married over twenty years and had eleven children the court justified its dismissal of the action in the following language: "Both [of the parties] are fond of their children and we are of the opinion . . . that this common and endearing tie, exercising a soothing and hallowing influence, renders reconciliation and reunion highly probable."

6. *Durand v. Her Husband*, 4 Mart. (O.S.) 174 (La. 1816); *Lalande v. Jore*, 5 La. Ann. 32 (1850); *Amy v. Berard*, 49 La. Ann. 897 (1897); *Snell v. Aucoin*, 158 La. 767, 104 So. 709 (1925); *Gormley v. Gormley*, 161 La. 121, 108 So. 307 (1926); *McKoin v. McKoin*, 168 La. 32, 121 So. 182 (1929).

In France, the strong tendency, worked out mainly with regard to divorce, is to consider reciprocal fault as double reason for releasing the parties rather than no reason at all.⁷ Certainly the majority of French writers favor this view.⁸ It must not be forgotten, however, that particularly in the case of cruel treatment there is much to be said for the view that mutual recriminations due to the heat of provocation may tend to cancel one another.⁹ Much must also be said for the French doctrine that where mutually intolerable offenses are not present, wide discretion should be left to the judge¹⁰ to attempt a reconciliation.

This question of whether two wrongs can ever make a right has not been materially discussed in the Louisiana decisions. The court has insisted upon the preservation of the marital status, but the constant change in our customs and conventions may bring about further modification of the present doctrine and its effects. In the event of releasing the spouses from an impossible marital relationship, the question as to which spouse should be granted the decree is of no importance except as to alimony¹¹ and custody of children, the matter of primary consideration being the dissolution of the marriage relationship for the benefit of all parties concerned.

W. S.

WILLS—REVOCATION OF SECOND WILL REINSTATES THE FIRST ONE—Upon the death of the testatrix, two purported wills in olographic form were offered for probate, one dated August 27, 1927 and the other April 5, 1928. The will bearing the posterior date con-

7. "*Lorsque le demandeur est lui-même coupable envers son conjoint, la seule conséquence de ce fait est que les causes du divorce existent en double, et qu'il y a deux raisons au lieu d'une pour le prononcer.*" 1 Planiol, *Traité Élémentaire de Droit Civil* (12 ed. 1937) 422, n° 1205.

(Translation) "When the plaintiff is himself guilty towards his spouse, the only consequence of this fact is that the grounds for divorce are double, and that there are two reasons instead of one for pronouncing it." See also 1 Marcadé, *Explication Théorique et Pratique du Code Napoléon* (5 ed. 1852) 607, n° 769.

8. See 1 Colin et Capitant, *Cours Élémentaire de Droit Civil Français* (8 ed. 1934) 216, n° 189 (5).

9. Cass., 18 janv. 1881, *Dalloz*. 1881.1.125; Cass., 12 janv. 1903, *Sirey*.1903.1.279.

10. 7 Aubry et Rau, *Cours de Droit Civil Français* (5 ed. 1913) 301-302, § 477.

11. See *Mouille v. Schutten*, 190 La. 841, 865, 183 So. 191, 198-199 (1938) (O'Niell, C.J., dissenting on the admission of testimony, not on the merits).

tained a revocatory clause and was torn into three pieces. Counsel admitted that the destruction of the second will had the effect of revoking it and so the only question at issue was the legal existence of the first will. *Held*, that the first will was never revoked. *Succession of Dambly*, La. Sup. Ct., Docket No. 34,952 (1938) (Rehearing denied, Jan. 10, 1939).

There has been no previous case in Louisiana jurisprudence establishing the time when the expressed revocation of the testator takes legal effect. The provisions of the Civil Code dealing with revocation,¹ except for a few immaterial changes, are the same as those of the Code Napoleon.² The earlier French commentators were of the opinion, and the jurisprudence was to the effect, that revocation of a posterior testament which itself had revoked an anterior testament only reinstated the earlier document to the extent provided by the testator in a formal expression of his intention.³ But more recently there has developed a strong tendency to modify this doctrine to the effect that a revocation of the revoking will is in itself a sufficient manifestation of intention on the part of the testator to reinstate his former testament.⁴ The underlying theoretical analysis is that the expression of the revocation has the immediate effect of revoking the substance of the earlier testament; but that nonetheless, the formal instrument remains in existence until the death of the testator and the revival of the substance may result from proof of the intention of the testator to reinstate the earlier document as his last will and testament.⁵ The present Louisiana decision reaches the same re-

1. Arts. 1690-1696, 1710, 1559, 1589, La. Civil Code of 1870.

2. Arts. 1035-1039, 1047, 953, French Civil Code.

3. "*La révocation d'un second testament qui lui-même en avait révoqué un premier, ne fait revivre le premier testament, qu'autant que le testateur a manifesté cette intention dans l'acte de révocation.*" (The revocation of a second will which itself had revoked a first one, only revives the first will insofar as the testator manifests this intention in the act of revocation.) Cass., 7 fév. 1843, *Sirey*.1843.1.513, *Dalloz*.1843.1.155. See also 22 Demolombe, *Cours de Code Napoléon, Traité des Donations Entre-vifs et des Testaments*, V (1876) 131-132, n° 162; Troplong, *Droit Civil Expliqué, Des Donations Entre-vifs et des Testaments*, III (3 ed. 1872) 565, n° 2065.

4. "*Quand la révocation est rétractée, le testament antérieur revit comme s'il n'avait jamais été révoqué.*" (When the revocation is withdrawn, the former will revives as if it had never been revoked.) 5 *Planiol et Ripert, Traité Pratique de Droit Civil Français* (1933) 759, n° 710. See also *Rennes*, 1er juill. 1878, *Sirey*.1879.2.117, *Dalloz*.1879.2.15; *Req.*, 26 mars 1879, *Sirey*.1879.1.253, *Dalloz*.1879.1.285; *Paris*, 1er mars 1929, *D.H.* 1929, 258; *Cass.*, 15 mai 1878, *Sirey*.1879.1.160, *Ref. Sirey*.1.696, *Dalloz*.1879.1.32. 11 *Aubry et Rau, Cours de Droit Civil Français* (5 ed. 1919) 514-515, § 725, adheres to the earlier strict view (see note 3, *supra*).

5. "*En effet, la révocation n'attaquant pas le corps et la substance du testament révoqué, et n'en altérant ni la forme ni la solennité, il n'est pas exact de dire qu'elle le mette entièrement au néant. Le testament continue à*

sult as that advanced by the late commentators and court decisions in France but is arrived at by a different legal analysis of the problem.

A testament is by its very nature alterable until the death of the testator, and this right of alteration is not susceptible to any restrictions, voluntary or otherwise.⁶ To make an express revocation, the testator must do so by a formal declaration of intention in an instrument written in the form and clothed with the formalities prescribed for testaments.⁷ A revocation is merely a provision incorporated into a will; or, when it stands alone, it is in reality nothing other than a will itself and is just as inactive and inoperative as a will until probated.⁸ If the revocation took effect immediately upon being incorporated into the will, this would in reality be giving a fixed status or legal existence to a part of the will (the revocation) before the death of the testator, in violation of the provisions of the Civil Code which stipulate that no will can have legal effect unless it has been probated.⁹ Employing the aforementioned premises, the Louisiana Supreme Court concluded that the revocation in the second will had no effect, as the will was never probated.

The language of the court in the principal case that "They [counsel] not only concede, but argue, that in the case at bar the revoking will was revoked,"¹⁰ would lead one to believe that if the question of destruction had not been conceded, the court might

subsister matériellement, et à constanter légalement la volonté que le testateur avait d'abord manifestée." (In effect, since the revocation does not attack the body or the substance of the revoked will, nor alter the form or solemnity, it is not exact to say that it [the revocation] makes it [the will] null and void. The will continues to exist materially, and legally to establish the wish that the testator had first manifested.) 11 Aubry et Rau, Cours de Droit Civil Français (5 ed. 1919) 515-516, § 725, note 12. See also 14 Laurent, Principes de Droit Civil (2 ed. 1876) 215, n° 197; 22 Demolombe, Cours de Code Napoléon, Traité des Donations Entre-vifs et des Testaments, V (1876) 134, n° 163; Troplong, Droit Civil Epliqué, Des Donations Entre-vifs et des Testaments, III (3 ed. 1872) 566, n° 2065.

6. Art. 1690, La. Civil Code of 1870; Succession of Boudreau, 10 La. Ann. 709 (1855); Succession of Gilmore, 157 La. 130, 102 So. 94 (1924); Succession of Nelson, 163 La. 458, 112 So. 298 (1927).

7. Arts. 1691-1692, La. Civil Code of 1870; Succession of Boudreau, 10 La. Ann. 709 (1855); Hollingshead v. Sturgis, 21 La. Ann. 450 (1869); Succession of Cunningham, 142 La. 701, 77 So. 506 (1918); Succession of Guiraud, 164 La. 620, 114 So. 489 (1927); Succession of Feitel, 187 La. 596, 175 So. 72 (1937). Contra: Fuselier v. Masse, 4 La. 423 (1832): A subsequent change of disposition of property, in a will which is invalid, shows such a sufficient change of mind as will revoke a former donation.

8. Saunders, Lectures on the Civil Code of Louisiana (1925) 339; Cross, A Treatise on Successions (1891) 103.

9. Art. 1644, La. Civil Code of 1870; Succession of McDermott, 136 La. 80, 66 So. 546 (1914); Succession of Feitel, 187 La. 596, 175 So. 72 (1937).

10. Succession of Dambly, La. Sup. Ct., Docket No. 34,952 (1938).

have concluded that the tearing of the will into three pieces was not a sufficient destruction to prevent the probating of the testament.

While an express revocation must be clothed with certain formalities,¹¹ a tacit revocation may either be made in the form of a valid posterior testament containing dispositions inconsistent with the previous testament,¹² or "from some act which supposes a change of will."¹³ Under Article 1589 the court has recognized the existence of a third method of revocation, but this is applicable only in those cases in which the erasures destroy some part that is essential to the validity of the will.¹⁴ The court has refused each time to recognize the intention of the testator unless it is established by some mode of active expression as provided in the Civil Code.¹⁵

Nowhere in the Code is it provided that the destruction of a will revokes it. This is no doubt due to the simple reason that after destruction of the testament there is no will in existence and the testator has placed himself in the same situation as though he had never executed a will.¹⁶ To accomplish revocation by de-

11. Arts. 1691-1692, La. Civil Code of 1870, cited in note 7, *supra*.

12. Art. 1693, La. Civil Code of 1870; Succession of Bowles, 3 Rob. 31 (1842); Hollingshead v. Sturgis, 21 La. Ann. 450 (1869); Succession of Muh, 35 La. Ann. 394, 48 Am. Rep. 242 (1883); Succession of Hill, 47 La. Ann. 329, 16 So. 819 (1895); Succession of Race, 144 La. 157, 80 So. 234 (1918).

13. Art. 1691, La. Civil Code of 1870. In the Succession of Hill, 47 La. Ann. 329, 333, 16 So. 819, 821 (1895), it was said that "'from some other act which supposes a change of will' is to be interpreted and explained by the following Article of the Code (1695). . . ." See also Hollingshead v. Sturgis, 21 La. Ann. 450 (1869); Succession of Muh, 35 La. Ann. 394, 48 Am. Rep. 242 (1883); Succession of Tallieu, 180 La. 257, 156 So. 345 (1934).

14. Art. 1589, La. Civil Code of 1870: "Erasures not approved by the testator are considered as not made, and words added by the hand of another as not written.

"If the erasures are so made as to render it impossible to distinguish the words covered by them, it shall be left to the discretion of the judge to declare, if he considers them important, and in this case only to decree the nullity of the testament."

In the Succession of Muh, 35 La. Ann. 394, 399, 48 Am. Rep. 242, 246 (1883), it was held that "Erasures of clauses in the body of the will affect only the dispositions erased. Erasure of the signature strikes at the existence of the instrument as a will."

15. The court cannot presume a change of intention for the testator, when he had done no act which supposed a change of will: Succession of Cunningham, 142 La. 701, 711, 77 So. 506, 510 (1918). A letter is not a revocation: Hollingshead v. Sturgis, 21 La. Ann. 450 (1869). The finding of a will among worthless papers in a valise does not raise the presumption that the intention of the testator was to revoke the testament: Succession of Blake-more, 43 La. Ann. 845, 848, 9 So. 496 (1891).

16. Succession of Hill, 47 La. Ann. 329, 16 So. 819 (1895). See also, Succession of Tallieu, 180 La. 257, 270, 156 So. 345, 349 (1934).

"*Bien que le Code soit muet sur la question, on admet cependant la révocation en se fondant sur l'inexistence du testament.*" (Even though the Code

struction, if the inference conveyed by silence on the part of the Civil Code is to be given effect, the destruction must be so complete as to render it impossible to offer the whole will in court for probation. There must be some essential part or parts missing; otherwise, the court would be legislating judicially by presuming the revocation of a will in physical existence which had not been revoked by any of the forms designated in the Civil Code.

H. P. S.

be silent on the question, the revocation is nevertheless conceded on the basis of the inexistence of the will.) 5 *Planol et Ripert*, op. cit. supra note 4, at 765, n° 714. See also 11 *Aubry et Rau*, op. cit. supra note 4, at 532, § 725.

Reviews

READINGS IN JURISPRUDENCE, by Jerome Hall. The Bobbs-Merrill Co., Indianapolis, 1938. Pp. xix, 1183. \$7.50.

The rank-and-file American lawyer looks upon law as a closed sphere—as a system apart from and unaffected by the impact of the economic and social forces of the time. He refuses to believe that old legal forms and procedures should yield an inch to modern scientific technique. He regards law essentially as a mere tool to be used for the attainment of a client's ends, and any proposal threatening its utility for such purpose as bad *ipso facto*. He decries the multiplication of governmental boards and commissions without appreciating that possibly the underlying cause is the inadequacy of legal technique. He defies those who encroach upon the sacred preserves of law practice, and rebukes the seventy per cent of our population who prefer letting their legal business go undone to having it done by lawyers, without realizing that the cause might lie in the ineptitude of the bar itself to solve the problem of the place and function of law in society.

And yet the rank-and-file lawyer should not be blamed. He is the product of a system of education which either ignores or insufficiently emphasizes the study of the function of law in society. Leaders in American juridical thought have been too few, and the few have been too little heeded. Law school courses in jurisprudence, comparative law and legal history have not been able to withstand the pressure of the "bread and butter" subjects.

But there are signs of change. A few seeds have fallen on fertile soil. An American legal philosophy seems about to emerge. Recent curriculum studies not only recognize the inadequacy of present day legal education, but propose that something be done about it. Considerable impetus to this movement in curriculum construction is likely to be supplied by Professor Hall's *Readings in Jurisprudence*. This volume makes available for convenient classroom use carefully selected materials from most of the great European and American thinkers in jurisprudence from the earliest times to the present. To the embryo lawyer the book draws back the curtain on a vista which portrays the "great line of the universal"—which reveals the ideas of the juridical giants

from Plato to Holmes—a stimulus certain to dissolve incipient provincialism.

Professor Hall has divided his book into three main parts, Philosophy of Law, Analytical Jurisprudence, and Law and Social Science. These parts are not mutually exclusive but represent differences in emphasis. The first part consists of eight chapters and seventy-seven selections (335 pages); the second part, seven chapters and fifty-four selections (334 pages); and the third part, ten chapters and eighty selections (487 pages). Without attempting to list all the important authors whose contributions appear in the book, I might name the following as representative and as indicative of the scope of the work: St. Thomas Aquinas, Aristotle, Austin, Bentham, Bingham, Blackstone, Cardozo, Carmichael, Carter, Cicero, Cohen, Cook, Corbin, Dewey, Dickinson, Duguit, Ehrlich, Frank, Fuller, Grotius, Hohfeld, Holmes, von Jhering, Kant, Kocourek, Korkunov, Llewellyn, MacIver, Maine, Markly, Oliphant, Patterson, Plato, Pound, Radin, Stammler, Terry and del Vecchio.

It would be impossible for the editor of such a work to satisfy everyone as to authors to be represented or in the selections to be made from each author. But, in my judgment, Professor Hall has done an exceptionally fine piece of work—one that shows wide reading, keen analysis and good judgment. The selected bibliography makes easily available favorite selections that are wholly or partly omitted.

With this handy volume now available it is to be hoped that jurisprudence will become a regular course in every curriculum, and that every law student will take the course.

GEORGE W. GOBLE*

MR. JUSTICE HOLMES AND THE SUPREME COURT, by Felix Frankfurter. Harvard University Press, Cambridge, 1938. Pp. 139. \$1.50.

The title of this book is too narrow. The book is in fact a brief and striking analysis of the social and economic problems facing this country and coming before the United States Supreme Court during the period of Mr. Justice Holmes' service on that Court, from 1902 to 1932. It is both interesting and valuable, and

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presents the view, not only of a friend and admirer of Mr. Justice Holmes, but of a scholar uninfluenced by prejudice or friendship. It is a pleasure to read this little volume after coming into contact with academic propaganda so characteristic of recent publications in the field of constitutional law.

The book contains three chapters: the first on "Property and Society," the second on "Civil Liberties and the Individual," and the third on "The Federal System." Criticism of the book may in good part be based upon the fact that its brevity prevents full discussion; but brevity is also one of the good qualities of the present volume, particularly in view of the fact that it is not intended primarily for lawyers. Its text occupies only 94 small pages.

The first chapter is open to the objection that, by its emphasis on Mr. Justice Holmes, it implies that he alone, among the members of the Court, stood for a liberal attitude toward social and economic legislation. For example, there is a reference to the view of Mr. Justice Holmes "in dissenting from his brethren in the Minimum Wage Case."¹ The uninformed reader would get the impression that Mr. Justice Holmes was the only dissenter. The author appears also to over-emphasize Holmes as a dissenter, and largely to disregard the cases in which he either concurred with his brethren or was the spokesman of the Court. Such of these cases as involve the Fourteenth Amendment are listed in an appendix to the volume. But reference to them in the text would have been desirable, as well as reference to *Pennsylvania Coal Co. v. Mahon*,² and to other cases in which Mr. Justice Holmes adopted what may be regarded as a conservative attitude. And Mr. Justice Holmes' dissents were not always the most effective. Compare his opinion in *Tyson v. Banton*³ with that of Mr. Justice Stone in that case and in *Ribnik v. McBride*.⁴

Chapter II clearly shows that Mr. Justice Holmes, while liberal in supporting social and economic legislation, took a different view as to "due process" where it affected civil liberties. The author properly says that "Mr. Justice Holmes attributed very different legal significance to those liberties of the individual which history has attested as the indispensable conditions of a free society from that which he attached to liberties which derived

1. P. 33.

2. 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

3. 273 U.S. 418, 47 S.Ct. 426, 71 L.Ed. 718 (1927).

4. 277 U.S. 350, 48 S.Ct. 545, 72 L.Ed. 913 (1928).

merely from shifting economic arrangements.”⁵ But, logically, such a view must admit the right of other judges to determine also what were “the indispensable conditions of a free society;” and liberty of speech and of the press are meaningless unless accompanied by some degree of freedom to earn a living. Mr. Justice Holmes recognized this in many of his opinions. He was not always consistent, and fully realized that logic was not the basis of law. The author is hardly justified in saying that a majority of the Court has consistently sanctioned restraints of the mind, and that a change of attitude was brought about by Mr. Justice Holmes’ dissents.⁶ And with reference to personal liberty, Mr. Justice Holmes’ dissent in *Bailey v. Alabama*⁷ cannot be regarded as supporting a liberal point of view.

In Chapter III, on the Federal System, there is, as in the other chapters, too much emphasis on dissent and too little attention given to the constructive influence of Mr. Justice Holmes. Any complete analysis would necessarily refer to Mr. Justice Holmes’ dissent in *Northern Securities Co. v. United States*,⁸ in which he stated or endorsed the most restrictive positions as to the federal commerce power; and to *Swift and Company v. United States*,⁹ in which Mr. Justice Holmes, speaking for the Court, adopted a liberal and constructive view of the commerce power. Here again it is not possible to harmonize Mr. Justice Holmes’ views; and it may be proper to suggest that certain of the so-called conservative judges contributed more to the expansion of the commerce power than did Mr. Justice Holmes. It is also desirable to call attention to the fact that the reader will derive from this book an erroneous view of Canadian federal power,¹⁰ in view of recent decisions of the Judicial Committee of the English Privy Council, and to the further fact that the present judicial construction of federal taxing and commerce powers under the Constitution of the United States leaves no “matters clearly beyond the legal powers of the nation.”¹¹

What is said in this review should not be construed as seeking to minimize the important services of Mr. Justice Holmes; nor as derogating from the value of Professor Frankfurter’s little

5. P. 51.

6. P. 62.

7. 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 145 (1911).

8. 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679 (1904).

9. 196 U.S. 375, 25 S.Ct. 276, 49 L.Ed. 518 (1905).

10. P. 69.

11. P. 75.

book. The reviewer would, however, appreciate a fuller and lengthier analysis, by Professor Frankfurter, of the influence of social and economic changes upon the construction and effect of the Constitution of the United States.

WALTER F. DODD*

THE ADMINISTRATIVE PROCESS, by James M. Landis. Yale University Press, New Haven, 1938. Pp. 160. \$2.00.

The Administrative Process contains the four Storrs Lectures on Jurisprudence delivered by James M. Landis at the Yale Law School in 1938. It is a worthy companion of a distinguished predecessor, *The Nature of the Judicial Process*, in which are recorded the Storrs Lectures of Justice Cardozo, given in 1921.

Dean Landis writes in his customarily incisive style concerning "The Place of the Administrative Tribunal," "The Framing of Policies: The Relationship of the Administrative and Legislative," "Sanctions to Enforce Policies: the Organization of the Administrative," "Administrative Policies and the Courts." His effort—a successful one—is to avoid the uncritical labeling process which so often characterizes punditical oratory at bar association *Kaffee Klatsches* where administrative law is being given a professional massaging.

But to say that Mr. Landis avoids uncritical labeling is not to say that he is uncritical. He perceives possibilities of careless, uninformed, or abusive administrative action. What he recognizes, however, is that they are no more inherent in the administrative process than, let us say, in the judicial process. Unlike many lawyers, he concerns himself with doing more than viewing with alarm; he addresses himself to a consideration of ways and means of controlling the dangers.

The refreshing thing about Mr. Landis' comments is their insistence upon the improvement of administrative methods, rather than upon the development of judicial restraints of the administrative power to adjudicate.

Justice Stone has remarked that "Courts are not the only agency of government that must be assumed to have capacity to

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govern," and Dean Landis adds that they are not "the only agency moved by the desire for justice." These are propositions which lawyers, schooled in the tradition of judge-worship (in the abstract), are prone to overlook. Further, lawyer-publicists tend to ignore the fact that only a minute fraction of administrative cases ever reach the stage of formal hearing, let alone the stage of appeal to a court. This single circumstance suggests the unwisdom of current efforts to extend the scope of judicial supervision over the adjudications of the administrative. For the possibilities of abusive action are fully present long before adjudication; and incalculable injury can be done, as Mr. Landis notes, merely by the institution of proceedings regardless of their outcome. Lawyers who are interested in the assurance that the administrative will function well and wisely should turn their attention from the courts and focus it instead on the administrative itself. It is there that "professionalism in spirit, the recognition that arbitrariness in the enforcement of a policy will destroy its effectiveness, and freedom from intervening irrelevant considerations," will produce the results that the sporadic, inexpert intrusion of the courts is unlikely ever to achieve. To such lawyers Dean Landis' lectures will give stimulation and insight, for they reflect the thought of an outstanding legal scholar who is now as well an experienced administrator. The volume should be on the required reading list of those whose thinking starts, rather than stops, when they hear the word "bureaucrat."

WALTER GELLHORN*

TRADE ASSOCIATIONS IN LAW AND BUSINESS, by Benjamin S. Kirsh, in collaboration with Harold Roland Shapiro. Central Book Co., New York, 1938. Pp. 374. \$5.00.

In recent years there has been a plethora of treatises dealing with the application of legal principles to specific situations rather than particular branches of the law. For example, the rules of the law of negligence that govern an impact between two motor vehicles, are the same as those that are applicable to a collision between two horsedrawn carriages. Yet books have been written on the application of the law of negligence to automobiles. While works of this type may not contribute to the development of the law as a science, they, nevertheless, have a mission to perform. At times they serve as reference books. Then again such a work

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may act as a critique in assisting to solve the problem whether changes in social and economic life require a readjustment of some rule of law.

Mr. Kirsh's well-documented monograph *Trade Associations in Law and Business* performs the latter function. It is timely in view of the fact that the creation of The Temporary National Economic Committee has directed attention to the problem of monopoly.

It is generally recognized that one of the questions of the day is the extent to which the competitive system is hampered by aggregations of capital, and to devise a remedy, if it is determined that they seriously throttle competition.

Mr. Kirsh is of the opinion that there are two practical alternatives, neither of which he deems desirable. The first is "further trustification," while the second is a policy of governmental regulation. He dismisses cavalierly the suggestion that the remedy may be found in a restoration of competition, which after all is the purpose of the anti-trust laws. He offers trade associations as a solution. One may be pardoned considerable skepticism whether the evils of monopoly can be reduced by implementing trade associations and whether such a course would be desirable, even if practicable. The author makes no effort to discuss the extent to which it is advisable to confer coercive powers on persons without Governmental status. Moreover, in addition to other implications of such a course, there is also a question whether it is desirable to subject the individual to supervision by other members of his group. Surely a trial by one's competitors is not a trial by one's peers, such as must have been contemplated by the Barons at Runnymede, and is guaranteed by the Constitution of the United States and most of the State Constitutions.

The book is an Apologia for trade associations. It is an advocate's plea, rather than an attempt at a judicial consideration of legal and economic principles. If the reader makes due allowance for the author's approach, he is likely to find a considerable amount of useful information on matters relating to trade associations. Limitations of space necessarily lead to rather cursory treatment of some topics. At times conclusions are assumed as though they were premises. Some of them seem to be subject to challenge and perhaps should not have been advanced without proof.

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Books Received

COURT OVER CONSTITUTION. By Edward S. Corwin. Princeton University Press, Princeton, 1938. Pp. xi, 273. \$2.50.

HANDBOOK OF THE CONFLICT OF LAWS. Second Edition. By Herbert F. Goodrich. West Publishing Co., St. Paul, 1938. Pp. xiv, 624. \$5.00.

HOW TO OPERATE UNDER THE WAGE-HOUR LAW. By Alexander Feller and Jacob E. Hurwitz. The Alexander Publishing Co., Inc., New York, 1938. Pp. vii, 248. \$3.50.

LAWYERS AND THE PROMOTION OF JUSTICE. By Esther Lucile Brown. Russell Sage Foundation, New York, 1938. Pp. 302. \$1.00.

LUCK AND OPPORTUNITY. By Francis L. Wellman, The Macmillan Co., New York, 1938. Pp. 214. \$2.50.

OLD YUKON—TALES, TRAILS AND TRIALS. By Hon. James Wickersham. Washington Law Book Co., Washington, 1938. Pp. xi, 514. \$4.00.

OUR ELEVEN CHIEF JUSTICES. By Kenneth Bernard Umbreit. Harper & Brothers, New York, 1938. Pp. xiv, 539. \$3.75.

PRACTICING LAW. By Silvester E. Quindry. Washington Law Book Co., Washington, 1938. Pp. vii, 567. \$3.75.

READINGS ON PERSONAL PROPERTY. Third Edition. By William T. Fryer. West Publishing Co., St. Paul, 1938. Pp. xxxii, 1184. \$5.00.

SIR WILLIAM BLACKSTONE. By David A. Lockmiller. The University of North Carolina Press, Chapel Hill, 1938. Pp. xviii, 308. \$3.00.

THE CONSTITUTION AND WHAT IT MEANS TODAY. By Edward S. Corwin. Princeton University Press, Princeton, 1938. Pp. xxviii, 215. \$2.00.

THE FORMATIVE ERA OF AMERICAN LAW. By Roscoe Pound. Little, Brown & Co., Boston, 1938. Pp. x, 188. \$2.00.

VALIDITY OF FOREIGN DIVORCES. By Hamilton Vreeland, Jr. Callaghan & Co., Chicago, 1938. Pp. liv, 355.